SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 178

BALTIMORE & CAROLINA LINE, INC., PETITIONER,

vs.

DONALD REDMAN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original	Print
Record from D. C. U. S., Southern New York	1	1
Docket entries	1	1
Summons	3	2
Complaint	4	3
Answer	9	6
Order for bill of particulars	12	7
Plaintiff's bill of particulars	15	9
Bill of exceptions	18	10
Appearances	18	10
Testimony of Mark J. Belton	18	11
Dr. Herbert T. Wikle	19	11
Terence M. Burrows	50	36
Donald Redman	77	61
James H. Scarr	126	103
Donald Redman (recalled)	127	103
Dr. Marcus Newstadter	144	118
Motion to dismiss	174	142
Testimony of Dr. Joseph Perez	178	145
Alfred O. Suessmuth	204	166
William M. Hudson	223	182
Wesley H. Morris	225	183
Alfred O. Suessmuth (recalled)	228	185

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 24, 1934.

—5561-C.

	Original	Print
Testimony of George Ramsey	230	187
Herman Charache	263	216
Fuad Shatara	280	230
Donald Redman (recalled)	289	238
Stipulation as to arrival of vessel, etc.	295	242
Motion to dismiss, etc.	295	242
Testimony of Donald Redman (recalled)	296	243
Plaintiff's requests to charge	297	244
Defendant's requests to charge	304	248
Charge to jury	305	249
Verdict	319	260
Motion to set aside verdict	320	260
Plaintiff's exhibit 1—Letter, dated October 28, 1932	321	261
2—Letter, dated November 2, 1932, and envelope postmarked November 2, 7:30 P. M., 1932	321	261
3—Letter, dated November 4, 1932	322	262
4—Letter, dated January 9, 1933	324	263
5—Letter, dated January 10, 1933, and envelope postmarked January 10, 2 P. M., 1933	324	263
Defendant's exhibit A—Letter, dated March 12, 1931	325	264
B—Affidavit of Donald Redman	326	264
C—Additional statement, signed by Donald Redman	330	267
D—Certificate of Department of Hospitals, Cumberland Hospital	333	269
Stipulation settling bill of exceptions	334	269
Order settling bill of exceptions and ordering same to be filed	334	270
Judgment	335	270
Petition for order allowing appeal	336	271
Order allowing appeal	338	272
Assignment of errors	339	272
Citation (omitted in printing)	340	
Order extending term until November 6, 1933	341	273
Stipulation as to record	342	273
Order filing record	342	274
Clerk's certificate (omitted in printing)	343	
Proceedings in U. S. C. C. A., Second Circuit	344	274
Opinion, Swan, J.	344	275
Dissenting opinion, Manton, J.	347	279
Judgment	349	281
Clerk's certificate (omitted in printing)	351	
Order allowing certiorari	352	282

[fol. 1]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

DONALD REDMAN

vs.

BALTIMORE & CAROLINA LINE, INC.

F. R. Graves, 44 Whitehall St.
Hunt, Hill & Betts, 120 Broadway.

DOCKET ENTRIES

Filings, Proceedings, etc.

Aug. 31, 1931—Filed præcipe and issued summons.
Sept. 1, 1931—Summons and complaint.
Sept. 18, 1931—Filed answer.
Sept. 30, 1931—Filed note of issue, motion for bill of particulars, ret. 10/6/31.
Oct. 6, 1931—Filed affdt. & notice of motion for bill of particulars. Memo end. Motion granted. No opposition —Bondy, J.
Oct. 13, 1931—Filed order for bill of particulars—Bondy, J.
Oct. 14, 1931—Filed bill of particulars.
Mar. 22, 1933—Before Bondy, J. Trial begun, adjourned to 3/23/33.
Mar. 23, 1933—Before Bondy, J. Trial continued, adjourned to 3/24/33.
Mar. 24, 1933—Before Bondy, J. Trial continued, adjourned to 3/27/33.
[fol. 2] Mar. 27, 1933—Before Bondy, J. Trial continued, verdict for plaintiff for $5,000.
Apr. 10, 1933—Filed judgment #33140 in favor of plaintiff for $5,042.50.
Apr. 10, 1933—Fees collected.
May 16, 1933—Filed petition for Appeal.
May 16, 1933—Filed order allowing appeal, Coxe, J.
May 16, 1933—Filed assignment of errors.

May 16, 1933—Filed supersedeas bond on appeal for $5,500. National Surety Corporation.

May 22, 1933—Filed citation of appeal—5/15/33.

June 10, 1933—Filed consent and order extending time to file record on appeal to 8/10/33.

Aug. 17, 1933—Filed consent and order extending time to file record on appeal to 8/30/33.

Sept. 5, 1933—Filed consent and order extending time to file record on appeal and return day of citation to 9/15/33.

Sept. 15, 1933—Filed consent and order extending time to file record on appeal and return day of citation to 10/16/33.

October 16, 1933—Filed consent and order extending time to file record on appeal and return day of citation to 10/30/33.

October 30, 1933—Filed consent and order extending time to file record on appeal and return day of citation to 11/6/33.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUMMONS

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable, John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 31 day of August, A. D. 1931.

Charles Weiser, Clerk. Frederick R. Graves, Plaintiff's Attorney, Office and Post Office Address: 44 Whitehall Street, Borough of Manhattan, City of New York.

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT

Action under Special Rule for Seamen to Sue Without Security and Pre-Payment of Fees for Enforcement of Laws of the United States, for the Protection of Health and Safety at Sea

The plaintiff, by Frederick R. Graves, his attorney, complaining of the defendant, respectfully alleges and shows:

First: Upon information and belief, that at all the times hereinafter mentioned, the above named defendant was and now is a corporation organized and existing under and by virtue of the laws of the state of Maryland, and at all said times was and is doing business in the state of New York, with an office for the regular transaction of business in the city of New York, state of New York.

Second: Upon information and belief, that at all the times hereinafter mentioned, the above named defendant was the owner of a certain vessel called the "Frances Weems."

[fol. 5] Third: That upon information and belief, that at all the times hereinafter mentioned, the above named defendant was in possession and control of the said Steamship "Frances Weems."

Fourth: Upon information and belief, that at all the times hereinafter mentioned, the above named defendant operated and controlled the said Steamship "Frances Weems."

Fifth: Upon information and belief, that on or about the 13th day of February, 1930, plaintiff was in the employ of the above named defendant on board the Steamship "Frances Weems" as a seaman (second cook).

Sixth: Upon information and belief, that at all the times hereinafter mentioned, the above named plaintiff was in the employ of the above named defendant on board the Steamship "Frances Weems" as a seaman (second cook).

Seventh: Upon information and belief, that it was the duty of the defendant to provide plaintiff with a safe place to work with reasonably safe tools and appliances, and to keep same in repair, with a suitable number of competent co-employees and superior officer; to promulgate and enforce proper and safe rules for the safe conduct of said work, and to warn the plaintiff of the dangers arising and to be encountered therein.

Eighth: That by reason of the negligent failure of the defendant and its servants to perform the foregoing duties and each of them, on or about the 13th day of February, 1930, while plaintiff was engaged in the course of his work [fol. 6] on board said vessel, and without fault on his part, he sustained severe and painful personal injuries when his foot was pierced and lacerated when it came in contact with a nail contained in some debris which littered the deck of said vessel in an unlighted portion thereof.

Ninth: Upon information and belief, that said injuries were directly caused by reason of the dangerous, defective, and unseaworthy condition of said vessel, and particularly because said deck which plaintiff was necessarily using as a passageway in the course of his work was littered with debris which contained sharp and unprotected and unguarded nails, and because said deck at said spot was not properly lighted, so that said debris was an encumbrance and a dangerous menace to life and limb; upon information and belief, that said injuries were further caused by reason of the negligence of the defendant and its servants in that they caused or permitted said conditions to exist, negligently failed to make proper inspection or to take steps to discover or remedy said defects, in that they negligently caused or permitted plaintiff to work under dangerous conditions, negligently caused or permitted said debris containing said nails to be and remain at said spot, negligently failed to remove the same or to light said spot, and negligently failed to warn the plaintiff of his danger.

Tenth: Upon information and belief, that by virtue of Section 33 of the Merchant Seaman's Act of June 5th, 1920, amending Section 20 of the Seamen's Act of March 4th, 1915, whereby all statutes heretofore enacted in favor of railroad employees engaged in foreign or interstate [fol. 7] commerce, and particularly Sections 8657 and fol-

lowing of the United States Compiled Statutes, were made applicable to seamen employed upon American vessels, the plaintiff is entitled to recover damages for the negligence of the defendant, and of his co-employees in the defendant's service.

Eleventh: That by reason of all the foregoing, plaintiff was rendered sick, sore, lamed and disabled, has suffered and will suffer great pain, has been and will be prevented from attending to his work for some time to come, has lost and will lose large sums of money which he otherwise would earn, has paid out and will have to pay out large sums of money for medical and surgical attention and medicines, one of his legs was necessarily amputated, and upon information and belief, that he has been permanently injured, all to his damage in the sum of Fifty Thousand Dollars ($50,000).

For a second, separate and distinct cause of action, plaintiff further alleges:

Twelfth: Repeats and re-alleges each and every allegation of the complaint hereinbefore contained with the same force and effect as if the same were herein again set forth in full.

Thirteenth: Upon information and belief, that upon plaintiff's being injured as aforesaid, it was the duty of the defendant to provide him with prompt and proper medical and surgical attention and medicine, and to take steps to transfer him to a hospital where he could be properly treated, and to pay his expenses of travel, maintenance and [fol. 8] hospitalization, all of which could have been promptly obtained by the use of reasonable diligence and the performance of said duties by the defendant which it owed to the plaintiff.

Fourteenth: Upon information and belief, that the defendant failed, neglected and refused to provide plaintiff with said hospitalization and maintenance, although he was in dire and urgent need of prompt and proper medical and surgical attention and medicines and hospitalization, and that by reason of the defendant's failure to provide him with the same and his failure to receive them, his injuries were greatly aggravated and his cure impeded and prevented, and upon information and belief, that one of his

legs was necessarily amputated by reason of said negligence, and that he has suffered unnecessary pain and discomfort and is permanently injured, all to his damage in the sum of Twenty-five Thousand Dollars ($25,000).

Wherefore, plaintiff demands judgment against the defendant in the sum of Fifty Thousand Dollars ($50,000); as damages and expenses of maintenance and cure, together with the costs and disbursements of this action.

Frederick R. Graves, Attorney for Plaintiff, O. & P. O. Address: 44 Whitehall Street, New York City, New York.

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

The defendant herein, by its attorneys, Hunt, Hill & Betts, answering the complaint, alleges:

First: It denies the allegations contained in Paragraphs eighth, ninth, tenth and eleventh;

Second: It denies the allegations contained in Paragraphs thirteenth and fourteenth of the complaint herein.

For a first, separate and distinct defense to both causes of action alleged in the complaint, defendant alleges:

Upon information and belief, that any injuries sustained or suffered by the plaintiff at the time and place mentioned in the complaint, were caused in whole or in part, or were contributed to by the negligence and want of care of the plaintiff and not by any negligence or fault or want of care on the part of the defendant.

[fol. 10] For a second, separate and distinct defense to the first cause of action alleged in the complaint, defendant alleges:

That plaintiff's employment had certain risks incident thereto which were obvious and well known to plaintiff at all the times of said employment and also when plaintiff

first entered thereon, and that said risks were assumed by the plaintiff; that whatever injuries plaintiff received in said employment and which are complained of by him herein, arose from and were caused by said risks, all of which were taken and assumed by plaintiff at the time he entered upon said employment and during the continuance thereof.

Wherefore, defendant demands judgment dismissing the complaint herein with costs.

Hunt, Hill & Betts, Attorneys for Defendant, 120 Broadway, New York, N. Y.

[fol. 11] *Duly sworn to by D. W. Barton. Jurat omitted in printing.*

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR BILL OF PARTICULARS—Oct. 10, 1931

A motion having been made by the defendant for an order directing the plaintiff herein to serve upon the attorneys for the defendant, within ten (10) days after the service of a copy of said order with notice of entry thereof, a verified bill of particulars concerning matters contained in said affidavit, and the said motion having regularly come on to be heard at a stated term of this Court held in and for the Southern District of New York at the Federal Court House, Borough of Manhattan, City of New York, on the 6th day of October, 1931, and the attorneys for the defendant having appeared in support of said motion and the plaintiff having defaulted,

Now, on reading and filing the notice of motion herein dated September 29, 1931, together with the proof of due [fol. 13] service thereof endorsed thereon and the affidavit of H. Victor Crawford sworn to the 29th day of September, 1931 in support of said motion and upon the pleadings and all the proceedings heretofore had herein, it is

Ordered that the said motion be and the same hereby is, granted and that the plaintiff within ten (10) days after the service upon his attorneys of a copy of this order with no-

tice of entry thereof serve upon the attorneys for the defendant a verified bill of particulars as follows:

1. State the exact time of day, giving the hour and minute when plaintiff sustained injuries on the 13th day of February, 1930, as alleged in the complaint herein.

2. State the exact location on the deck of the SS "Frances Weems" where plaintiff's foot came in contact with a nail, as alleged in Paragraph Eighth of the complaint, stating the name of the deck, the position in respect to starboard or port side, and the distance and direction from the nearest hatch.

3. State the nature of the debris which plaintiff alleges in Paragraphs Eighth and Ninth of the complaint littered the deck of the vessel, and state when said debris was put upon the deck.

4. State what points on the vessel were connected by the passageway referred to in Paragraph Ninth of the Complaint.

5. State the location of the nearest light to the spot referred to in Paragraph Eighth of the complaint, and state [fol. 14] whether said light was burning at the time of the alleged injury.

6. State to what officer or person on the ship plaintiff reported his alleged injury and the time when he made such report.

7. State whether plaintiff received any treatment on board the steamship for his alleged injury.

8. State whether the plaintiff attended any hospital, giving the name of said hospital and the time during which plaintiff was confined therein and when he first was admitted.

9. State whether plaintiff entered or attempted to enter any United States marine hospital at the time of his alleged injuries.

10. State what sums plaintiff has paid out for medical and surgical attention and for medicines as alleged in Paragraph Eleventh of the complaint.

11. State what negligent acts, other than those alleged in Paragraph Ninth of the complaint, plaintiff claims defendant or its agents committed.

William Bondy, United States District Judge.

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFF'S BILL OF PARTICULARS

The plaintiff, by Frederick R. Graves, his attorney, by his bill of particulars in answer to defendant's demand, respectfully alleges:

1. About 5 A. M.

2. After main deck, starboard side, between the hatch on said deck and the starboard rail.

3. Empty crate; said debris had been on the deck for at least seventeen (17) hours.

4. Plaintiff was going from his quarters to the kitchen amidships, and said passageway referred to was the route which was necessarily followed on said deck between said points.

5. There were no lights whatsoever.

6. Plaintiff reported the accident to the steward the next day.

7. Plaintiff did not receive any treatment on the vessel, said steward telling him that he was unable to do anything for him.

[fol. 16] 8. Plaintiff was a patient in the Cumberland Street Hospital, Brooklyn, New York, having entered said institution on February 21st, 1930, from which he was transferred to Kings County Hospital, Brooklyn, New York, on June 4th, 1930, where he remained until February 21st, 1931.

9. Plaintiff was unable, on account of his condition, to proceed to any U. S. Marine Hospital, and was obliged to get treatment at the nearest hospital.

10. Plaintiff expended various small sums of money for liniment and bandages; no hospital bill has been rendered to him as yet, and plaintiff is unable to state what the amount will be.

11. Failure to treat, as contained in the foregoing.

Dated New York, October 9th, 1931.

Yours, etc., Frederick R. Graves, Attorney for Plaintiff, O. & P. O. Address: 44 Whitehall Street, New York City, N. Y.

To Hunt, Hill & Betts, Esqs., Attorneys for Defendant, O. & P. O. Address: 120 Broadway, New York City, New York.

[fol. 17] *Duly sworn to by Donald Redman. Jurat omitted in printing.*

[fol. 18] IN UNITED STATES DISTRICT COURT

L 50—252

DONALD REDMAN, Plaintiff,

against

BALTIMORE & CAROLINA LINE, INC., Defendant

Bill of Exceptions

Before Hon. William Bondy, J., and a Jury

New York, March 22, 1933,
2:15 P. M.

APPEARANCES:

Frederick R. Graves, Esq., Attorney for Plaintiff.
Hunt, Hill & Betts, Esqrs., Attorneys for Defendant; By H. Victor Crawford, Esq., of Counsel.

A jury was impaneled, examined by the Court, and duly sworn.

MARK J. BELTON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Graves:

Q. Mr. Belton, have you been subpoenaed by the plaintiff in this case to produce the hospital records of the Cumberland Street Hospital, covering the case of Donald Red-
[fol. 19] man?

A. Yes, sir.

Q. And have you those in your possession there?

A. Yes, I have.

Q. Let me have them, please?

A. Yes (handing papers to Mr. Graves).

Mr. Graves: You may leave the stand. (Witness excused.)

A Juror: Can we have a recess for a couple of minutes?

The Court: Yes, we will take a recess for five minutes, gentlemen.

(Informal recess.)

DR. HERBERT TEMPLE WIKLE, called as a witness on behalf of the plantiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Graves:

Q. Dr. Wikle, are you a licensed physician and surgeon?

A. I am.

Q. How long have you been practicing?

A. About fourteen years.

Q. Are you at the present time connected with any medical institution in New York City?

A. I am.

Q. And what is the name of that institution?

A. Cumberland Street Hospital, Carson-Peck Memorial Hospital.

Q. Are there others?

A. Well, I am also connected with the Long Island Medical College.

Q. Were you connected with the Cumberland Street Hospital in February, 1930?

A. I was.

[fol. 20] Q. In what capacity?

A. As a surgeon—attending surgeon.

Q. Did you in February, 1930, come into contact as a physician with a man named Donald Redman?

A. I did.

Q. And is that the man sitting in the court room now in the second row next to the window there (indicating)?

A. It is.

The Court: When did you first see the plaintiff, Redman?

The Witness: Around the 21st or 22nd of February. I am not sure of the date.

Q. 1930?

A. Yes.

Q. Have you an independent recollection of this case?

A. I have, yes.

Q. He was admitted, was he not, on February 21, 1930, to that hospital?

A. I think the records will show.

Q. Well, will you consult the record and tell us?

Mr. Crawford: If the record shows that, I will concede it.

Mr. Graves: It does.

Mr. Crawford: Then I will concede it.

A. Yes.

Q. What was he suffering from at the time of his admission?

A. Gangrene of the foot.

Q. Which foot?

The Court: You examined him, did you?

The Witness: I did.

The Court: What did you find?

The Witness: That he had gangrene of the foot.

[fol. 21] Q. Which foot?

A. Left foot.

Q. Will you describe to the jury how much of his foot was affected by gangrene at that time when you first saw him?

A. About the distal two-thirds of the foot. That means the toes and beyond the base of the toes.

Q. Half way up to the ankle?

A. No; to the beginning of the arch of the foot. I can show you, perhaps.

Q. The middle of the instep?

A. About the beginning of the instep. The distal two-thirds of the foot, as we term it.

Q. You treated him while he was in the hospital, did you?

A. I did.

Q. And you performed an operation on his foot, did you?

A. I performed an operation on his leg.

The Court: Tell us what the treatment consisted of?

The Witness: The treatment?

The Court: Was he kept at the hospital?

The Witness: Yes, he was.

The Court: How long did he stay there?

The Witness: Well, the full length of time—I think he was in there from the 21st of February to the 4th of June. That was the entire time. I did not treat him over that entire period, however.

The Court: What did you do? What did your treatment consist of?

The Witness: My treatment consisted of an operation upon the vessel of his leg.

Q. On what date was that operation performed by you?

A. I think it was—I will consult the chart here—on the 23rd, as I remember it—no; on the 24th.

[fol. 22] Q. Of February?

A. February 24, yes.

Q. Give us the name of the operation that you performed?

A. Periarterial sympathectomy.

Q. Now, tell the jury the nature of that operation.

A. It is the removal of the nerves about the artery. The artery has several coats. The outer coat consists of sympathetic nerves or in the outer coat are included the sympathetic nerves of the artery; and the operation is the re-

moval of those nerves; stripping off, in other words, the nerves around the artery. They were removed for a distance, in this case, I think, of about 14 centimeters, and there are two and a half centimeters to an inch.

Q. How many centimeters?

A. About 14. I don't know whether it states here on the chart, but that is the usual amount that I remove, and it is the most that you can remove without interfering with the——

Q. What part of the anatomy did you perform that operation upon?

A. On his thigh, on the inside.

Q. That is, the femoral artery?

A. The femoral artery.

Q. And those arteries have three layers?

A. Chiefly, yes.

Q. And the nerves are in the central layer?

A. No, the nerves are in the outer layer.

Q. Well, that is what you scraped off?

A. Yes.

Q. And what was the purpose of that operation?

A. The purpose of that operation was to give more circulation to the vessel. The periarterial nerves contain the food to produce or to carry on a wave that is normal in all vessels. That wave is known as vasoconstriction and vasodilatation; and by removing that coat, you destroy the constricting element in the vessel.

[fol. 23] Q. Is that all you did?

A. I severed his femoral vein.

Q. Tell the jury what you mean by that?

A. I picked up the femoral vein and severed it, taking a section of it out, so that it would not function.

Q. Did you do anything else?

A. That is all.

Q. You saw this man again after that, did you?

A. Yes.

Q. And did the case get any better?

A. It improved, yes.

Q. But eventually it got worse, did it?

A. Eventually it got worse, yes.

Q. Have you the date when the amputation was made?

A. Yes, April 17th.

Q. You had decided on another operation—amputation?

A. No; I did not, because I was not on the service at that time; but an amputation became necessary.

Q. Did it become necessary?

A. It did.

Q. And was performed?

A. Yes.

Q. By whom?

A. Dr. Shatara.

Q. Now, Dr. Shatara performed the actual amputation of the leg, did he?

A. He did.

Q. But it was necessary?

A. It was.

Q. On account of this gangrene?

A. Yes.

Q. Now, this man also had syphilis, did he not?

A. According to his record here, he did, yes.

The Court: Did you examine him for that?

The Witness: We had his blood examined, and his blood was positive for the syphilitic test.

Q. And what did the test read?

A. 4 plus, Wasserman.

Q. Did you have any other test taken for that purpose?

A. No.

[fol. 24] Q. Did you examine his blood otherwise, for sugar and so forth?

A. It should be here. His urine was examined for sugar. His blood was not examined for sugar, so far as I can tell from this chart. Oh, yes, his blood was examined for sugar; also urea.

Q. Was the result of those or did the result of those examinations show a normal condition?

A. Yes.

The Court: That is, the blood was normal?

The Witness: For sugar, yes.

Q. The only unusual circumstance, then, was the 4 plus syphilis?

A. That is right.

Q. Otherwise, he appeared to be in good bodily health?

A. Yes.

Q. Except for this gangrene?
A. Yes, except for the gangrene.

Mr. Graves: You may cross examine.

Cross-examination.

By Mr. Crawford:

Q. Dr. Wikle, you thought that this man had some trouble with the arteries in his leg and foot, did you?
A. I did.
Q. And you made several examinations of his foot, yourself?
A. Yes, I examined him. I don't know how many times.
Q. Did you talk to him about his case?
A. Yes.
Q. Did he ever at any time mention to you having run a nail in his foot?
A. No.
Q. Did you ask him how it happened that his leg got into this condition?
A. Yes.
Q. What did he say to you?
A. He said that he had had a sudden pain in his foot, and [fol. 25] that at the instigation of a friend of his, he had soaked his foot in hot water, or applied very hot applications, and after that this condition appeared.
Q. Did you observe any blisters on his foot at first?
A. Yes, there were blisters on his foot.
Q. And would that verify his statement that he had applied hot water to his foot?
A. It would.
Q. Did you see on his foot any cut or abrasion that would indicate that he had run his foot on to a nail?
A. I did not.
Q. And in your opinion, Doctor, had he run his foot on a nail, and this gangrenous condition developed in a period of about eight or nine days, would that cut or abrasion still be visible, had it ever been there?

Mr. Graves: I object to that unless it is definitely stated as to the character of abrasion and as to the extent of it.

The Court: Can you or have you enough facts assumed by counsel to enable you to express an opinion?

The Witness: No.

The Court: You have not?

The Witness: No.

The Court: Then, say so. Say that you can not.

The Witness: I can not.

Mr. Crawford: We are a little handicapped because we have not had the plaintiff's statement as to what this cut was.

Q. Assuming that there was a nail wound in this foot, Doctor, sufficient to cause a bad infection followed by gangrene, do you think, from from experience, that you would have been able to see that nail wound at the time you [fol. 26] examined this man in the hospital some eight or nine days after the alleged accident?

Mr. Graves: That is objected to on the ground that it calls for a conclusion.

Mr. Crawford: This is an expert witness.

The Court: He is not asking for a conclusion. He is asking for his opinion. He was not there. He knows nothing about what happened, but he asks his opinion as a physician, whether after eight or nine days following an injury by a nail, it would cause an infection that he could see. The fundamental facts on which that hypothetical question is based are not in evidence yet.

Mr. Graves: No. I object to it on the ground that I have not examined the doctor as an expert, and that this is not proper cross examination.

The Court: You have not examined him as an expert?

Mr. Graves: No, sir; just to testify to the facts.

The Court: Did you qualify him as an expert?

Mr. Graves: No, sir.

The Court: You did not?

Mr. Graves: I qualified him as a physician, but I have not asked his opinion as an expert. I have only asked him to describe what he found.

The Court: Then, I would suggest that you ask him——

Mr. Graves: They may recall him on their case, for that purpose, as part of their case, but not now on cross examination.

[fol. 27] Mr. Crawford: I think I am entitled, on cross-examination, to go beyond the mere facts of this case, to

test this doctor's ability, if you like. I am quite satisfied with it, but it seems to me that I may ask questions which would tend to indicate his qualifications.

The Court: It is not cross-examination.

Mr. Crawford: All right, sir. Will you repeat the question?

The Court: Where there has been a wound, through a foot coming into contact with a nail, which develops a gangrenous condition, would you say that there would be evidence of that wound apparent in the foot eight or nine days after the foot came into such contact?

The Witness: Yes, I would.

Q. But you saw no such evidence in this case, Doctor, did you?

A. I did not.

Q. Now, Doctor, there are various types of gangrene, are there not?

A. There are.

Q. And will you state what some of the causes of gangrene are?

A. Exposure to cold, exposure to heat, clots forming in vessels, acute illness, typhoid, scarlet fever, diphtheria, pneumonia—definite diseases in the vessels, where the walls of the vessels break down and accloy the lumen of the vessel.

The Court: There are many causes?

The Witness: Yes, there are many causes.

The Court: Even more than you have mentioned?

The Witness: Yes, more besides those.

[fol. 28] Q. One of the causes, of course, is an open wound—of gangrene?

A. It may be caused by an open infectious wound, provided the right type of infection is carried in through that wound.

Q. The gangrene that is caused by an open wound, does that differ in any way from the gangrene caused by an arterial stoppage, or one of those other types that you have mentioned?

A. It does.

Q. What is that difference?

A. Gangrene caused by an infection has with it also the evidence of the infection, which gives it a pussy discharging surface, known as the wet type of gangrene.

The Court: Can you tell upon an examination of gangrene whether it is caused by a physical condition of the patient or whether it is caused by some external means?

The Witness: Yes.

The Court: They differ?

The Witness: Yes, they do.

The Court: The symptoms are different?

The Witness: Yes, they are.

Q. Now, in this case, Doctor, from your examination of this man on several occasions, and from the operation which you performed on him, could you say that this condition of gangrene which you found in this man's leg was caused by a wound or otherwise?

A. I think it was caused otherwise.

Q. And in your opinion it was this arterial condition that you have mentioned?

A. Yes, sir.

The Court: You say that his gangrene was caused by an arterial condition?

[fol. 29] The Witness: I think so.

The Court: And can you speak with reasonable certainty when you say it was not caused by some external means?

The Witness: Yes.

Q. Now, Doctor, when you have a gangrenous wound, do you attempt to localize it in treating it?

A. Yes, to limit the gangrene.

Q. To limit the spread of the gangrene?

A. Yes.

Q. And in those cases you do not attempt to aid the circulation by shooting blood—more blood through by an arterial operation, such as you have described?

A. No.

Q. Tell us how you do treat an arterial gangrene?

A. With the operation I have already described.

Q. And that is sympathectomy?

A. Yes, and we also do a gangrene operation which goes higher, and attacks the gangrene before it becomes part of the periarterial course.

Q. The methods of treating those two types of gangrene are quite the reverse?

A. They are.

The Court: They are entirely different, are they?

The Witness: They are.

The Court: And they are not the same gangrene?

The Witness: They are not.

Mr. Crawford: That is all.

Redirect examination.

By Mr. Graves:

Q. Doctor, is it not the fact——

[fol. 30] The Court: One is caused by an infection, and the other is caused by some external means?

The Witness: Yes.

The Court: While the other is due to an internal condition of the body?

The Witness: Yes.

The Court: And are they both called "gangrene"?

The Witness: Yes, they are both called "gangrene".

Q. Doctor, is it not the fact that any kind of a puncture of a person's skin or the tissues of the body, sufficient to draw blood, may be sufficient to produce infection?

A. Yes.

Q. So that if you stick—suppose a person is liable to infection—that is, predisposed to infection, with a system that is in a condition to be infected by bacteria, the slightest prick of a pin or any introduction of a foreign body with bacteria in or on it, into the blood stream, will cause an infection; is that not so?

A. Well, am I testifying as an expert, your Honor, now? It seems to me that some of these questions are expert questions?

The Court: Yes, he is asking you for an expert opinion.

Mr. Graves: They have made him their expert, and I am cross examining him as an expert.

The Witness: Yes, that may produce an infection.

Q. So that the slightest scratch, sufficient to draw blood, will be sufficient to cause infection, will it not?

A. It will be, yes.

[fol. 31] Q. And such a slight scratch that you might not be able to see it eleven days later?

A. Well, you would be able to see it eleven days later, yes, because the infection originating there would produce definite local reactions where it originated.

Q. You have a diagram of this man's foot in this hospital record?

A. Yes, we have a diagram here.

Q. And that shows that on the left foot at the point—at the top of the instep, that is, at the ankle point——

Mr. Crawford: Is this going to be introduced in evidence? If so, I would like to know who drew it, your Honor.

The Court: Let us see what he says. Do you want that in evidence?

Mr. Graves: No, leave it out.

Q. You testified that you found blisters on his foot?

A. Yes.

Q. Where were those blisters?

A. Around his ankle and just above the gangrenous area.

Q. On the left foot?

A. Yes.

Q. And the skin was broken there, was it?

A. It was broken, yes.

Q. Did you look under that skin to see whether there was any puncture mark?

A. No, I did not.

Q. The blisters had broken, had they not?

A. Not all of them.

Q. Some of them had?

A. Yes.

Q. You don't know whether there was any puncture mark under the blisters?

A. I do not.

Q. The whole surface of that foot was raw?

A. Not the whole surface.

The Court: Where were the blisters? Between the ankle and the sole of the foot?

[fol. 32] The Witness: They were on the upper surface of the foot, near the ankle.

The Court: Between the toes and the ankle?

The Witness: Yes, between the toes and the ankle; not on the bottom part of his foot, but on the top part of his foot.

Q. Is it shown on that diagram?
A. Yes.
Q. And that shows right here in the ankle joint (indicating)?
A. Below the ankle joint, yes.
Q. Right at the ankle joint?
A. Above the instep.
Q. Look at the diagram.
A. I am looking at it now.
Q. Is it not right at the ankle joint?
A. No, it is below there.

Mr. Crawford: Is that going in evidence?
The Court: The diagram will be the best evidence of what it shows.
Mr. Graves: Are you willing to put it in—the diagram?
Mr. Crawford: I have not seen it. I don't know what it is.
Mr. Graves: All right, here it is (handing paper to Mr. Crawford).
Mr. Crawford: Your Honor, this is a pen and ink sketch by someone—whom I do not know at all. I do not think this is proper evidence in this case.
The Court: Do you offer it?
Mr. Graves: I will offer it if he consents. If he objects, I will not.
Mr. Crawford: Yes.

[fol. 33] Q. Have you any independent recollection of where those blisters were, Doctor?
A. No, not all of them. I recollect that there were blisters, some of which had repaired, and some of which had not.

The Court: Did you see any scar or sign of an abrasion?
The Witness: I did not look specifically for it, but I examined his foot, and saw no evidence of such.

Q. You looked at it casually, did you?
A. No, I looked carefully.
Q. Did you examine it for a wound?
A. I examined it for whatever was there.

Q. The slightest scratch, sufficient to draw blood, is a competent cause for causing gangrene?

A. Yes, it may.

Q. Provided the patient is predisposed to being infected, is not that so?

A. Yes.

The Court: Will general infection cause or give rise to gangrene? Would that be a competent cause of gangrene that you have described?

The Witness: No.

Q. If a man had syphilis, would that be a competent producing cause?

The Court: The syphilis itself?

Mr. Graves: No, a nail plus syphilis.

A. I could not answer that question.

The Court: Assuming that a man has syphilis, and he [fol. 34] scratches his foot with a nail, and it is infected, could that infection cause the gangrene which you have described to the jury?

The Witness: No.

Q. Why not?

A. Not without producing definite local evidence of the infection.

Q. Do you mean to say there was no evidence of any infection in this case?

A. (No response.)

Q. Now, is it not the fact, Doctor, that infection can be produced without bacteria?

A. Infection without bacteria?

Q. Yes?

The Court: Can that happen?

The Witness: No.

Q. Is it not true that gangrene can be caused without bacteria?

A. Oh, yes. We have already mentioned that it can.

Q. Now, is it not the fact that syphilis and many other diseases are a cause of deterioration of the arteries?

A. Yes.

Q. And how many different causes are there of deterioration of the arteries?

A. There are numerous causes of deterioration of the arteries, some of which we have mentioned. Old age, senile degeneration——

Q. Alcoholism?

A. Yes.

Q. Tobacco?

A. Yes.

Q. Diabetes?

A. Yes.

The Court: Swift living?

The Witness: Yes, swift living and numerous other causes.

Q. In fact, they are multitudinous?

A. Yes.

[fol. 35] Q. And whether a person has good arteries or not is simply a relative term, is it not?

A. Yes, it is.

Q. And many people are born with poor arteries?

A. That is true.

Q. And they may be congenitally afflicted with poor arteries?

A. They may.

Q. And they may be congenitally afflicted with syphilis?

A. That is right.

Q. And all those various diseases, including acquired habits, such as drinking and smoking?

A. Yes, that is right.

Q. So anyone is liable to have bad arteries?

A. That is right.

Q. Is it not the fact that the number of syphilitic persons in the United States is well in excess of a million—the known syphilitics?

The Court: What has that got to do with this case—whether there are a million or a billion? It may be interesting, but it has nothing to do with this case. I feel sorry for them—did you say a billion?

Mr. Graves: No, I said a million, known.

The Court: That may be not so far afield.

Q. If a person has arteries that are depreciated or deteriorated, he is much more apt to get gangrene from an infection than if he has healthy arteries, is not that so?

A. Quite true, yes.

Q. And as matter of fact people with syphilis may go all through life without getting any gangrene, is not that true?

A. They may, yes.

Q. And it is usually the introduction of some moving cause, such as the introduction of infection into the system, that brings on the acute stage of gangrene, is not that right?

A. No.

[fol. 36] Q. Do you say that syphilis, in and of itself, will cause gangrene?

A. No, not by itself.

Q. It must be in conjunction with something else?

A. The results of syphilitic degeneration in the arterial system of the body predisposes to the formation of clots and vegetation.

Q. And mere syphilis itself will not cause gangrene?

A. No.

Q. There must be something else to bring about thrombosis?

The Court: Syphilis will not produce it, you say, alone?

The Witness: No, syphilis will produce various conditions in various parts of the body. It may produce vegetation upon the valves of the heart, and material may be thrown from that into a vessel through the circulation, or vegetation may form on the heart through the normal span of life, and the person may die of some other cause; but if he has a sudden shock, or something happens to him that he does not take care of properly, that vegetation may be thrown into the circulation, and occloy a vessel somewhere in the body.

Q. And that applies to any of the other diseases you have spoken about?

A. Yes, that applies to the other diseases as well.

Q. Is it not the fact also that if a person has diseased arteries, the introduction of infection is practically certain to bring on gangrene?

A. No.

Q. If it is an acute infection?

A. No.

Q. Well, it can be a competent producing cause, can it not?

A. Yes, it can be.

[fol. 37] The Court: If infection is the cause of gangrene, is that gangrene different from gangrene which was not brought on through infection?

The Witness: Yes.

The Court: The two are entirely different?

The Witness: Yes.

Q. But you say that infection can produce it—can be a competent producing cause?

A. With diseased arteries, yes.

Q. And in that case the diseased arteries would be only a complication?

A. Yes.

Q. And as matter of fact did you not put down on the records in this case "Complications, Syphilis"? Look at the first page of that record (handing witness papers)?

A. No, I did not put anything down here at all.

Q. Who put that down?

A. One of the internes.

Q. You called in a consultant in this case, did you not?

A. Yes.

Q. And what was his name?

A. I did not call him in, no.

Q. Well, he was called in?

A. Yes, later.

Q. And of course you considered his opinion in arriving at your diagnosis?

A. Yes.

Q. And you have considered that now in all your testimony, have you? You have given that some weight?

A. No, I have not.

Q. Do you mean to say you have disregarded what the consultant told you about the case, after he was called in?

A. Because the consultant was called in after I was through with the case. He was called in just before amputation. I did not call him in.

[fol. 38] Q. Will you read what the consultant said on that record?

Mr. Crawford: I object to that as not the proper way of proving whatever this other doctor is going to say.

The Court: He may read that record to refresh his recollection.

Mr. Crawford: Yes, but he cannot testify about it.

The Witness: The question was antiluetic or anti-syphilic treatment. The doctor who is the syphilologist for the hospital treats all patients for syphilis. He makes a note here "Gangrene of the foot may not be luetic cause."

Q. That is, may not be of syphilitic cause?
A. Yes.
Q. That is what the expert said that you called in?
A. I didn't call him in.
Q. Well, he was called in?
A. Yes, he was.
Q. He is a recognized authority, is he not?
A. In the treatment of syphilis, yes.

The Court: What is his name?
The Witness: Takami.

Q. He was called in by the hospital as a consultant in this case?
A. Yes.
Q. And in your testimony that you have given on the stand have you given any weight to Dr. Takami's opinion there?
A. No.
Q. You had read it before, had you not?
A. No, I had not.
Q. Now, will you read it, and tell me whether you wish to change your opinion at all?

[fol. 39] Mr. Crawford: And read all of it this time, Doctor.

The Witness: This is the record of the consultant. Shall I read it aloud?

The Court: No; read it to yourself.
Mr. Graves: You read it to the jury before.
The Witness: I only read part of it.
Mr. Graves: Now, read all of it.
The Witness: "Gangrene of the foot may not be luetic cause, but he needs anti-luetic treatment at once to aid healing after amputation."

Q. And by that you take it that that means that syphilis may not have been the cause of the gangrene, is that right?
A. No, I do not.
Q. Well, what does that mean, Doctor?

A. Well, he was asked for one opinion, and he gave two, in the first place. He was asked relative to anti-luetic treatment, and he gave an opinion that the man needed anti-luetic treatment; and he also stated about gangrene, which he was not asked about.

Q. That it might not have been due to syphilis?

A. Yes.

Q. In other words, he put something down there that you did not ask for?

A. That is right.

Mr. Crawford: I object to that.

The Witness: And he is not an expert in gangrene.

The Court: Is he in court?

The Witness: I do not see him here.

The Court: Where is he now? Is he living?

The Witness: Oh, yes, in Brooklyn.

[fol. 40] The Court: In Brooklyn?

The Witness: Yes.

The Court: He can be gotten?

The Witness: I suppose so.

Q. Now, Doctor, you say that he put down something that was not asked for?

A. Yes.

Q. I thought you just said you had never seen that opinion before, and that he came into the case after you dropped out? How do you know that?

A. Because I didn't ask him to come in to see it.

The Court: Were you there when he came in?

The Witness: No, I was not there.

Q. He came in long afterwards?

A. Yes.

Q. How do you know he was not asked that, if he came in after you were out of the case?

A. Because it states up here, in the consultation sheet what the question is.

Q. And you do not think that is broad enough to include the other answer?

A. No.

Q. But even if it were, you would not give his opinion on that any weight?

A. Not relative to the gangrene, because he is not an expert on gangrene.

Q. He is an expert on syphilis?

A. Yes.

Q. Can not a man who is an expert on syphilis be an expert on the results of syphilis?

A. He can, yes.

Q. But you would not give his opinion any weight as to what syphilis may cause?

A. Yes.

Q. As matter of fact, gangrene might be a symptom that a man had some syphilis in his system?

A. It is possible.

[fol. 41] Q. But at the same time if that man stated anything along that line, you would not give it any credit?

A. If I thought it was entirely due to his syphilis, I would, yes.

Q. Now, Doctor, as matter of fact, any kind of infection, where a man has diseased arteries, is very apt to bring on gangrene, is it not?

A. Quite likely, yes.

Q. And assuming that this man did have a puncture of his foot on February 13, and that bacteria was introduced into the blood stream, and an infection ensued, and that the man had syphilis, as evidenced by a 4 plus test, would you not say that the introduction of that nail into the blood stream, and that bacteria, and the consequent infection, could be a competent producing cause of the gangrene?

A. Not of the type of gangrene that he had, no.

Q. What do you mean by that?

A. He did not have the type of gangrene that is produced by infection.

Q. You mean a wet gangrene?

A. He had a dry gangrene, and there was no evidence of infection.

Q. As matter of fact, was not this gangrene wet at the beginning, when he first came into the hospital?

A. No, it was not.

Q. Look at the records and see if it is not stated that "the gangrene is beginning to become dry"?

A. There may be a statement in here made by an interne, of which I know nothing, but it was not during my period of observation of the case.

Q. Now, Doctor, gangrene is nothing more nor less than a shutting off of the blood? That is what it is caused by, is it not?

A. Yes.

[fol. 42] Q. A choking up of a blood vessel, of the blood supply?

A. That is right.

Q. And the tissues mortify or die below the point of the obstruction?

A. Yes.

Q. And it may be caused by various things, but an infection can bring it on in an acute stage, is not that right?

A. If you have already got an existing arterial condition, yes.

Q. In other words, if you have impaired arteries, an infection will precipitate that condition, is not that right?

A. Yes.

Q. And will induce it?

A. Yes.

Q. And be a competent producing cause of it?

A. Yes.

Q. Now, in this particular case you did not have any pathological tests made of the tissue of the blood vessels, did you?

A. I don't know whether it was made or not. It should have been.

Q. Look at that record and tell us whether any such tests were made?

A. As a general rule, they have to bury a member of the body when it is amputated, and pathological specimens are very rarely taken, if a foot or an arm or a hand is removed, because they have to be buried, according to the law of the city; and I don't think a specimen was taken. It usually is not unless specifically requested.

Q. No specimens were taken of the tissues?

A. There is no mention of it here.

Q. So no test was made to ascertain the extent to which the impairment had progressed?

A. Not at the time of the operation.

Q. Now, this operation that you performed on the femoral artery was simply an exploration?

A. No, it is a definite procedure.

Q. Is it not experimental?

A. No, it is not.

[fol. 43] Q. Are you familiar with a work called "DeCosta on General Surgery"?

A. Yes.

Q. Is he a recognized authority on surgery?

A. Yes.

Mr. Crawford: I can see no purpose in this particular phase of the examination, unless it be for Mr. Graves to impeach his own witness.

Mr. Graves: You made him an expert.

Mr. Crawford: And I therefore object to any further questions along this line.

The Court: You produced him as your witness.

Mr. Graves: Only as to primary facts, but my opponent made him an expert on his own behalf, and I have a right to cross examine him.

The Court: Well, you may have your exception. I think you are technically right.

Mr. Crawford: I think I am too. Exception.

The Court: Yes.

Q. I will show you this, and you can verify whether what I am reading is true. I will read this and ask you whether you agree with this statement at page 93 of the tenth edition of DeCosta.

A. What year is that?

Q. 1931 (reading). Do you agree with that statement?

A. I agree with that statement coming from a group of surgeons in this country. The profession is divided as to the efficiency of those things. However, they are not on trial, because the particular operation I did has existed since 1899.

[fol. 44] Q. Well, that is on trial, is it not?

A. It is not on trial, when it has existed that long, no.

The Court: Did you operate for exploratory purposes?

The Witness: I did not.

Q. Was it on trial when that book was published in 1931?

A. No, it was not.

Q. You do not agree with that statement, then, do you?

A. I do not.

Q. So that when we come right down to it, if this man actually had his foot punctured with a nail, the whole course of your opinion would be altered as to whether or

not the syphilis was the cause of this thing or simply a complicating cause, is not that right?

A. Yes.

Q. So that it just comes down to a question of whether he did have a scratch, and infection ensued, and then the nail would be a competent producing cause, is not that right, as you have just stated?

A. Yes, infection as a result of the nail, that would be.

Q. Of course, you are basing this theory of an embolus on your opinion?

A. Yes.

Q. But you do not know whether an embolus was there, because you did not find one?

A. No, I do not.

Q. And you did not have an examination of the arteries or the blood vessels to find out whether the diseased condition of the arteries had progressed so far that there was an embolus or anything of that sort?

A. Had there been an embolus, it would not have been in that part of the leg that was amputated.

Q. You did not see any embolus at any time?

A. No.

[fol. 45] The Court: Before you operated on him did you make an examination of him?

The Witness: Yes.

The Court: Did you examine the condition of the arteries?

The Witness: Yes.

The Court: What did you do?

The Witness: By testing the surface temperature of his leg, by palpating for pulsation in the two main vessels of his foot, the anterior and posterior vessels, and there was no pulsation in either, and the surface of the leg was cold, and the temperature lowered, as we always have in a completely obstructed vascular condition.

The Court: Was that general throughout the body or localized?

The Witness: The obstruction of the vessel was localized.

Q. As matter of fact, you never opened his arteries or any of his blood vessels?

A. Yes, I cut some of them.

Q. But you did not cut into the main artery?

A. No.

Q. So you do not know whether there were any emboli in them or not?

A. I know there was none in the area I operated.

The Court: Can you tell from an examination of a patient's eyes, the fine blood vessels of the eyes, what his condition is?

The Witness: Yes.

The Court: Is that an indication of the condition of the blood vessels?

The Witness: Yes, particularly in arteriosclerosis and [fol. 46] the diabetic type of degeneration.

The Court: Can you tell by touching the patient?

The Witness: Yes, you can tell by touch.

The Court: The general condition of a man's arteries?

The Witness: You can, yes.

The Court: Did you examine his arteries?

The Witness: I did.

The Court: All right.

Q. Is there any place in that record where you put down any result of an examination of his eyes by you?

A. No, there is not.

Q. You did not examine his eyes?

A. No.

Q. All you did was to make or perform this operation on the thigh, to scrape the surface of the artery?

A. Yes.

Q. And the purpose of that was to cut off the nerve connections?

A. Yes.

Q. To eliminate the automatic, spasmodis closing of the artery?

A. Yes.

Q. And you did not open the artery and find any emboli?

A. No.

Q. And, it is purely guesswork as to whether any emboli were present at all?

A. No, it is not guesswork.

Q. How could you tell that there were any emboli present without opening and actually finding an embolus?

A. Of course, that would be the most definite way of telling it, but there are many things that we can tell otherwise.

Q. All right, tell us what the symptoms were of emboli?

A. The man had a definite history of a sudden onset of [fol. 47] pain; he treated his foot with heat, where the circulation was already impaired: and we find in diabetes and all forms of circulatory disturbance that heat and cold will produce gangrene of the type that he had. He had, as I say, a history of a sudden onset of pain, which, in my opinion, means some sudden, definite thing happening to the circulatory apparatus. He was not of an age where we would begin to think of senile degeneration of the vascular system. He did not have, in his laboratory examinations, any evidence of diabetes or nephritis; and because of those things, and because of the lowered temperature on the surface of his leg, we felt that he had a sudden stoppage, and that sudden stoppage must have been due to emboli. It is fairly definite, because those are the symptoms you have to deal with, and you can, by other pathological examinations, eliminate other conditions that would produce the same thing.

Q. Now, Doctor, an embolus may be caused by any one of numerous different things?

A. Yes.

Q. And you did not find any embolus, but you guess there was an embolus present or you formed that opinion from certain other things that you have described, is that right?

A. I felt reasonably sure that there was.

Q. Now, you say pain is one of the reasons?

A. Yes.

Q. Is pain also a symptom of infection?

A. Yes.

Q. So that pain could be caused by infection as well as by these other things that you have described?

A. Yes.

Q. Is that right?

A. Yes.

Q. Now, thrombosis can cause the same condition as an embolus?

A. Yes.

[fol. 48] Q. A thrombosis is a blood clot?

A. Yes.

Q. And an embolus is some foreign body or portion of tissue that has gotten loose, and is obstructing a blood vessel?

A. That is right.

Q. So far as your examination of his leg is concerned, without opening any of those arteries, you can not tell whether it is a thrombosis or an embolus, can you?

A. No, I could not.

Q. And it is simply a guess on your part that this was an embolus?

A. No, a thrombus comes on, as a general rule, in the lower leg more gradually. It is not as sudden in its onset.

Q. A thrombus can be brought on by infection?

A. Yes, a thrombus may be brought on by infection.

Q. And when a thrombus is brought on by infection it is very rapid in its formation?

A. It can be.

Q. And gangrene develops rapidly and acutely?

A. It begins very gradually—gangrene produced by a thrombus.

Q. As soon as you have a complete stoppage——

A. (Interposing.) Yes, but in thrombus you do not get a complete stoppage immediately.

Q. Well, you may have the two together?

A. You mean gangrene and a thrombus?

Q. Yes.

A. You may have the two together, yes.

Q. At any rate, all you know is that this man had syphilis, and there was a stoppage in his blood vessels or arteries of his leg at some point or other, and gangrene developed, is not that right?

A. That is right.

Q. And that stoppage could have been brought on by infection—by even the small prick of a nail, provided bacteria was introduced, is not that right?

A. That is right.

[fol. 49] Q. You are not being paid anything by me, are you?

A. I don't think so; not that I know of.

The Court: Are you being paid anything by the other side?

The Witness: Not yet.

The Court: Have they promised you anything?

The Witness: No.
The Court: Has the other side subpœnaed you?
The Witness: Both sides subpœnaed me.
The Court: Both sides subpœnaed you?
The Witness: Yes.

Recross-examination.

By Mr. Crawford:

Q. Gangrene of this type could not be brought on by infection—the type of this man's, Redman?
A. It could not, no.

Mr. Crawford: That is all.
Mr. Graves: That is all.

(Witness excused.)

The Court: We will adjourn now until tomorrow morning at half past ten, gentlemen.
Mr. Graves: Will the Court direct the witnesses to return tomorrow?
The Court: I will, but I do not know what good it does. They are entitled to a fee. I will direct them, but I cannot punish them if they do not come.

(Adjourned to Thursday, March 23, 1933, at 10:30 o'clock A. M.)

[fol. 50] New York, March 23, 1933.

Trial Continued:

Mr. Graves: If the Court please, I offer in evidence the deposition of the first officer of the steamship "Frances Weems", Terence M. Burrows, taken by the defendant on March 11, 1932. I offer the entire deposition.
Mr. Crawford: I think the only way to do that in this court is to read question and answer.
The Court: Yes; how otherwise would the jury know what was said.

"Terence M. Burrows, a witness called on behalf of the defendant, having been first sworn, testified as follows:

"Direct examination.

"By Mr. Meagher:

"Q. Mr. Burrows, you are now in the employ of the Baltimore and Carolina Line, Inc., are you?

"A. No; A. H. Bull & Co. They operate the Baltimore and Carolina Line.

"Q. And on what ship are you employed now?

"A. On the 'Jean'.

"Q. Where is that vessel now?

"A. At Pier 29, Brooklyn. She is going to shift to Pier 27 about noon.

"Q. And where are you going from there?

"A. To ports in Porto Rico and back again.

"Q. About how long do you expect to be away?

"A. About twenty-one to twenty-seven days.

[fol. 51] "Q. What job do you hold on that ship now?

"A. Chief mate.

"Q. And how long have you been going to sea?

"A. It will be seventeen years this coming June.

"Q. And what licenses and certificates have you?

"A. I have a master's license, unlimited, and nine endorsements for pilot licenses.

"Q. Now, on February 13, 1930, were you employed by the Baltimore and Carolina Line, Inc.?

"A. Yes, sir.

"Q. On board the steamship 'Weems'?

"A. Yes, sir.

"Q. And you were first mate on that vessel, were you not?

"A. Chief mate, yes.

"Q. Where was the 'Frances Weems' on February 13, 1930?

"A. The nearest I can come to that is that we sailed Saturday, whatever day Saturday was, and I am positive that we were at Pier 27, Brooklyn, because we came in and anchored and went to that pier the whole time we were in New York. What date was Saturday? I think it was the 15th.

"Q. As far as you can recall, you were there on the 13th of February, 1930?

"A. We were there, undoubtedly.

"Q. What work was being done aboard the vessel on the 12th, say on the 12th of February, 1930?

"A. I wish I had my log book with me. The ship was undoubtedly loading cargo at that time.

"Q. What kind of cargo?

"A. General cargo.

"Q. How long does that loading of cargo continue during the day?

"A. As a rule, from seven to eight in the morning until five o'clock in the evening, unless in a rush they work overtime, then they work nights.

[fol. 52] "Q. What were your duties as first mate on this vessel?

"A. In charge of the ship during the captain's absence, and directly in charge of the deck department.

"Q. When you say, in charge of the deck department, just what duties did that include?

"A. The upkeep of the ship, the hull of the ship, and the deck, the upkeep of the cargo gear, and the handling—I mean, the loading of the cargo, and in general charge of the decks of the ship.

"Q. Now, do you recall what the condition of the deck was on February 13, 1930?

"A. No, I could not recall that. I could say about what it would be.

"Q. Will you state that?

"Mr. Graves: I object to that. It is too speculative.

"Mr. Meagher: All right.

"Q. Is it among your duties as first mate to inspect the condition of the deck?

"A. At all times I am responsible for the condition of the deck.

"Q. But you do not recall what the condition of the deck was on February 13, 1930?

"A. No, sir, I could not.

"Q. Do you know what the condition was at about five o'clock in the morning of February 13, 1930?

"A. No, sir; I could not recall that.

"Q. What time did you knock off duties on February 12, 1930, as far as you can recall?

"A. My duty ends at five o'clock, unless they are working cargo, and then I was on duty, unless I am needed, that is; I am on duty at all times whenever I am needed, but on

that date I cannot say because it is too far off; I cannot remember.

"Q. Now, when you abandon your duties for the day is [fol. 53] it customary for you to give any orders to any other members of the crew?

"A. Yes, sir, I give orders to the mate on watch, the second or third mate, whichever it may be, to see that the watch is kept, and the lines attended, and it is my custom to give the orders to him that the night watchman shall clean up the decks during the night, so that the ship will be clean to start with the next day, to coil up the lines and straighten the decks in general.

"Q. Do you recall giving such orders on the evening of February 12, 1930?

"A. No, I cannot recall that.

"Q. Do you recall not giving such orders?

"A. No, sir; in fact, I do not always give them. I give them to the mate when he comes aboard, and tell him that that is the custom. This was the case just last night. Knowing of this case, of course, and the condition of the decks, unconsciously I gave the order to the mate last night, a new third mate who had just joined the ship, for the watchman to sweep the decks and coil up the lines and have them in a clean condition to start this morning with.

"Q. Did you know the second cook aboard the 'Frances Weems' on February 13, 1930?

"A. No, sir; I remember the name distinctly, seeing it on the articles, but the man I have tried to recall and cannot.

"Q. Would you recognize him if you met him?

"A. I would; if I met him I would recognize him; yes, sir. The steward I remember distinctly, and every one of the crew, that is, if I saw them, for, of course, you live with them and you know them.

"Q. Now, you know that Redman claims to have sus- [fol. 54] tained an injury aboard the 'Frances Weems' on February 13, 1930?

"A. Yes, sir.

"Q. When was the first time that you learned of any such claim by Redman?

"A. When I received a letter from the company's lawyers asking me regarding this claim.

"Q. Did Redman or anyone else report any such injury to you?

"A. Not to me.

"Q. In the course of this voyage?

"A. No, sir.

"Q. Or any time thereafter?

"A. No, sir. I knew nothing of it.

"Q. So that the first intimation you had of it——

"A. Direct.

"Q. (Continuing:) —was from the advice from the line?

"A. That is it.

"Q. What was the custom aboard the 'Frances Weems' regarding the reporting of injuries? Was there any rule regarding that?

"A. Yes, sir. The rule is to report to the head of the department aboard the 'Frances Weems' when any injury occurs.

"Q. Head of the department?

"A. Yes, that would have been the steward.

"Q. The department to which the man injured belongs?

"A. Yes.

"Q. And in that case whom would that be?

"A. The steward.

"Q. And was it customary, was there any rule to the effect that the steward should report that injury to any higher officer?

"A. Yes, sir.

"Q. What officer would the steward report that injury to?

"A. Either to the mate or to the captain.

"Q. You state that no report of any injury to Redman was ever made to you?

"A. Not to me, no, sir.

[fol. 55] "Q. You spoke about giving orders to any man coming aboard the vessel?

"A. Any officers.

"Q. Any officers?

"A. Yes, sir.

"Q. Was it the custom on the 'Frances Weems' to advise any members of the crew of the rule that you have just spoken of?

"A. No, sir, not to the men. They are directed through the officer only. The men are directed only through the officer on watch because the men themselves would ignore those things, having no interest whatever in the work.

"Q. Now, in the bill of particulars it is claimed that this injury occurred aft of the main deck on starboard side be-

tween the hatch and the starboard rail. Did you know whether or not there are any lights aboard the 'Frances Weems' around that vicinity?

"A. Yes, sir; I know; the gangway light, the starboard side you say?

"Q. Yes.

"A. The gangway light would be there.

"Q. What kind of a light is that?

"A. Cluster light this large around (indicating) with a couple of bulbs in it.

"Q. What power bulbs are those, do you know?

"A. About 50 watt; as a rule they are 50 watt.

"Q. About 50 watt?

"A. And the deck house on the forward part of that deck would have deck lights of one bulb shining.

"Mr. Graves: I move to strike all of that out, as to what would be there.

"The Witness: No, they were actually there. They were actually there at the time of the accident.

"Q. When you say 'would be there', what do you mean?

"A. Was there.

"Q. Do you recall whether or not the lights that you [fol. 56] have described were in the places that you have mentioned on February 13, 1930?

"A. Yes, sir; they were there.

"Q. And were they working?

"A. Yes, sir; they were working; if they were not I would know it because I would be——

"Mr. Graves: Strike that out. I move to strike that out as a conclusion.

"Mr. Meagher: Strike the last part of it out beginning 'if they were not'.

"The Witness: They are fixtures, the same as this light on the ceiling here (referring to light in office).

"Q. Where were the cook's quarters aboard the 'Frances Weems'?

"A. Aft in the poop.

"Q. And was there a passageway running from the cook's quarters to the kitchen?

"A. No, sir.

"Q. Where was the kitchen?

"A. The kitchen was amidships.

"Q. And in order to get from the cook's quarters to the kitchen, how would you have to go?

"A. You would have to come out the door in the face of the poop, the center, and come along the after well-deck, either on the port or starboard side, and reach amidships.

"Q. But other than the deck itself there was no separate passage?

"A. No separate passage.

"Q. Between the cook's quarters and the kitchen?

"A. No, sir.

"Mr. Meagher: That is all.

"Cross-examination.

"By Mr. Graves:

"Q. Are you still employed by one of the companies associated with the defendant in this case?

"A. Yes, sir.

[fol. 57] "Q. That is, by the Bull Steamship Company?

"A. Bull Steamship Company.

"Q. It is the Baltimore and Carolina Line, the defendant in this case?

"A. Yes, sir.

"Q. They are affiliated with that company?

"A. Yes, sir.

"Q. It is all one at this time?

"A. Yes, sir.

"Q. You so understand that?

"A. Yes, sir.

"Q. You say that this vessel was at Pier 27, Brooklyn, February 13, 1930?

"A. Yes, sir.

"Q. When did you leave that pier after that date; when did the vessel sail?

"A. The vessel sailed on Saturday. The date I do not remember, but it was the Saturday at that time in February, around that date.

"Q. When did you arrive at that pier?

"A. I could not say the date, but it was two or three days before sailing.

"Q. How many days were you at that pier?

"A. Two or three days.

"Q. So you do not remember the date you sailed away and you do not remember the date you arrived?

"A. No, sir.

"Q. Did you have any shore leave during the time the vessel was in the dock?

"A. Yes, sir.

"Q. How much of the time were you ashore?

"A. Each evening.

"Q. Between what hours?

"A. Between six and midnight.

"Q. Did you have your dinner before you went ashore?

"A. Yes, sir.

"Q. You say the longshoremen worked between seven in the morning and five at night?

"A. Yes, sir.

"Q. Continuously?

"A. Not continuously.

"Q. Except for lunch?

"A. No, sir.

[fol. 58] "Q. More or less continuously?

"A. Yes, sir; as freight lulled; there was a lull in the freight, and they would stop.

"Q. There was loading and unloading?

"A. No, sir; continuous loading.

"Q. What hatches are there in the after well-deck?

"A. Two hatches.

"Q. What do you call those, 4 and 5?

"A. No, sir, in that small ship it is just 3 and 4.

"Q. Was there cargo in those two hatches?

"A. Yes, sir.

"Q. What sort of cargo?

"A. General cargo.

"Q. Sacks and boxes and crates?

"A. Yes, boxes and crates.

"Q. And all sorts of things?

"A. All sorts of things, yes.

"Q. When the longshoremen are working there unloading there is always a lot of debris left around, isn't there?

"A. Not from the cargo. It is very seldom these crates get broken, and if broken they are stacked on the dock and the carpenter repairs them before they are allowed to come in.

"Q. Didn't you testify that it was the custom every night to clean up the deck where they worked?

"A. Yes, sir.

"Q. So there was stuff to clean up, wasn't there?

"A. Yes, sir.

"Q. And it was the general custom to clean up after the longshoremen finished?

"A. Yes, sir, after the longshoremen finished.

"Q. There is always trash around there, debris and things of one sort or another?

"A. Well——

"Q. Different sorts of things?

"A. Yes, sir.

"Q. Different boxes that had broken and one thing and another that had been broken; there is always a lot of trash around there, and you always have to clean up at the end of the day?

"A. Yes, sir.

[fol. 59] "Q. You were in charge; it was your duty to look after that; and on this particular day, this particular time it was your duty to see to this general clean-up and the hatches, at the end of the day, at five o'clock, is that right?

"A. That is right.

"Q. Each day?

"A. Each day.

"Q. And you had other duties on board, didn't you?

"A. Yes, sir.

"Q. You had to be all over the ship, more or less?

"A. I had my duties all around.

"Q. And at five o'clock you went to get dinner before you went ashore?

"A. Yes, sir.

"Q. What time was dinner?

"A. Five o'clock.

"Q. So that you were not on the deck at five o'clock on any of these days that you were in port, were you, around these hatches?

"Mr. Meagher: Five o'clock in the evening, is it?

"The Witness: Yes.

"Q. You were not on deck; you were eating dinner?

"A. Yes, sir.

"Q. Where did you eat dinner?
"A. In the saloon amidships.
"Q. Where are your quarters?
"A. On the boat deck under the wheel house.
"Q. Up forward?
"A. No, sir; right above the saloon.
"Q. Right above the saloon?
"A. Yes, sir.
"Q. Forward of the after well-deck, is that right?
"A. Yes, sir.
"Q. Were you dressed up; did you clean up and dress before you went ashore?
"A. Yes, sir.
"Q. And you had one hour to eat and clean up before you went ashore; is that right?
"A. Yes.
[fol. 60] "Q. You went ashore at six?
"A. Yes, sir.
"Q. Every evening?
"A. I don't remember. I don't remember every evening.
"Q. You said you were ashore every evening?
"A. I was.
"Q. You went ashore usually at six o'clock, didn't you?
"A. Yes, sir.
"Q. And you had one hour from the time the longshoremen quit work to eat your dinner and clean up to go ashore? Is that right?
"A. That is right.
"Q. Of course, you wanted to get ashore as soon as possible after a hard day's work; is that right?
"A. That is right.
"Q. Your work was over at five o'clock, wasn't it?
"A. Yes, sir, but I would not be in a hurry to go ashore because I live in Baltimore. I only went ashore in New York to visit friends.
"Q. Didn't you state that you went ashore every evening?
"A. Yes, sir.
"Q. At six o'clock?
"A. I said about six o'clock.
"Q. It may have been before or a little after?
"A. It may have been.
"Q. At any rate you went from your work right to eat and from there to your quarters; is that right?

"A. That is right.

"Q. To dress up and go ashore, is that right?

"A. Yes, sir.

"Q. You would then go ashore; is that right?

"A. Yes, sir.

"Q. That was the course you followed every day in port?

"A. Yes, sir.

"Q. Would you dress before dinner or afterwards?

"A. Afterwards.

"Q. Now, you say it was your duty to see that this general cleaning up of the decks was made each day after the [fol. 61] men knocked off work, is that right?

"A. That is right.

"Q. And you said that the men themselves could not be trusted to do that, the sailors?

"A. No, sir, they cannot be.

"Q. Is that right?

"A. That is right.

"Q. Because somebody had to oversee them to see that that was done?

"A. Yes, sir.

"Q. That is true on that ship?

"A. That is true on all ships.

"Q. You knew that at that time?

"A. Yes, sir, I knew that.

"Q. You had to have someone stand over the men and see that the decks were cleaned up; is that right?

"A. That is right.

"Q. Would the longshoremen do that or the sailors?

"A. Sailors.

"Q. And some officer of the vessel had to see that the sailors did that work every day; is that right?

"A. That is right.

"Q. You had found that unless that was done in the first place that they did not do it properly and had left debris around, is that right?

"A. That is right.

"Q. So that you had notice of the fact that some officer had to see that that work was properly done; is that right?

"A. That is right.

"Q. And you say that was your duty?

"A. That was my duty.

"Q. Who was on watch when you went ashore?

"A. I don't remember.

"Q. You don't know who was on watch?
"A. Either the second or third officer.
"Q. You do not remember any particular day?
"A. No, they alternated.
"Q. You do not recall on any particular date in Feb-
[fol. 62] ruary, at Pier 27, what officer was on duty at five o'clock on?
"A. I do not.
"Q. Were you still on duty technically at five o'clock?
"A. Yes.
"Q. You were?
"A. No; that word 'technical'——
"Q. You were on duty until you left the ship?
"A. In charge.
"Q. In general charge?
"A. Yes, sir.
"Q. You were the boss of everybody else except the Captain?
"A. That is right.
"Q. And you were in complete charge of the decks?
"A. Yes.
"Q. And your duty was to see that they were cleaned up?
"A. Yes, sir.
"Q. You do not recollect speaking to any of the other officers about cleaning up the decks in February, 1930, while the vessel was lying at Pier 27, do you?
"A. I do not recall.
"Q. And you do not know what they did in your absence?
"A. No, sir.
"Q. What time did you go back on board the ship on those various nights that you were ashore?
"A. I can only say about midnight.
"Q. May it have been later?
"A. It may have been an hour later.
"Q. Could it have been two hours later?
"A. Yes, sir.
"Q. And could it have been three hours later?
"A. No, sir.
"Q. Do you recall the time?
"A. No, I do not recall it.
"Q. You do not recall what time you came aboard any night, do you?
"A. No.

"Q. And you say you visited friends ashore?

"A. Yes, sir.

"Q. And you do not recollect what time you came back to the ship?

"A. I always leave there—they stay up late, about one [fol. 63] o'clock—I would leave there—well, it would be from twelve to one.

"Q. When would you get up in the morning of those various days while the vessel was at Pier 27 in February, 1930?

"A. Not later than seven o'clock.

"Q. And then you would have your breakfast?

"A. Yes, sir.

"Q. When would you get back on the after deck in the morning?

"A. I am liable to be there before seven o'clock.

"Q. Well, do you remember any particular occasion what time you got out on deck?

"A. No, I do not.

"Q. It might have been after breakfast or it might have been before breakfast? Is that right?

"A. That is right.

"Q. So it might be quite a while after breakfast upon those days?

"A. I would be absolutely up on deck right immediately after breakfast, not later than eight o'clock.

"Q. But you were not on deck at any time at five o'clock in the morning on these dates, were you?

"A. No, sir.

"Q. You do not know actually from your personal knowledge that the lights were burning at five o'clock in the morning on any of those dates, do you?

"A. No, sir.

"Q. You have no personal knowledge as to whether the lights were burning at any time between two o'clock in the morning and five o'clock in the morning on any of those dates?

"A. No.

"Q. You have no personal knowledge as to whether the lights were burning between two o'clock and seven o'clock in the morning; you were asleep at that time?

"A. Asleep, yes.

"Q. You know there were certain riggin-s there for [fol. 64] lights where you say lights were burning?

"A. That is right.

"Q. But whether the lights were burning, of that you have no personal knowledge?

"A. Not between those hours; no, sir.

"Q. That is what I am talking about; that is right?

"A. That is right.

"Q. You have no recollection of any particular day as to when lights were burning?

"A. No recollection for that day but——

"Q. Or any other time?

"A. Yes, those lights were burning always when I was on the ship.

"Q. Do you recall any particular time when they actually were burning?

"A. Yes, sir.

"Q. Where were you at the time on this occasion that you recall?

"A. Coming aboard the ship.

"Q. When?

"A. At night.

"Q. What date?

"A. I cannot say the date.

"Q. What time of night?

"A. I cannot say the time of night; when I returned from visiting my friends.

"Q. Let us be frank about this.

"A. Yes, sir.

"Q. Isn't this the situation: You think the lights must have been burning because they should have been burning, is that right?

"A. I know that when I came aboard the ship if they were out it would strike me as a shock. I could not go back. I could not go through a dark passageway.

"Q. Isn't this the substance of your testimony, that you do not recall actually any particular time whether the lights were burning or not, and that you also do not recall that they were not burning?

"A. That is a fact; that is too long ago.

"Q. You simply do not recall them not being burning, and therefore you assume that they must have been burning; is that the substance of your testimony?

"A. That is the substance when you put it that way. If [fol. 65] you come in this room in the night and it is dark you would know it.

"Q. How long had these other mates been on board the vessel?

"A. The second mate——

"Q. How long had they been on board the vessel on February 13, 1930?

"A. The second mate, Mr. Johnson, was aboard four months.

"Q. The third?

"A. And the third mate the same length of time. They came together.

"Q. They came together?

"A. Yes, sir.

"Q. Was the captain ashore every evening, too, when the vessel was at Pier 27?

"A. I could not say; I don't know.

"Q. As a rule everybody went ashore except the man on watch?

"A. Yes, sir.

"Q. Is that right?

"A. Yes, sir.

"Q. You just kept one officer, one deck officer?

"A. One deck officer in charge.

"Q. And the rest of them were all off; is that right?

"A. Yes, sir.

"Q. You do not particularly remember this Redman?

"A. Only his name.

"Q. Can you describe him at all?

"A. No, I cannot describe him.

"Q. Have you any recollection at all of what he looked like?

"A. No, sir.

"Q. No recollection at all?

"A. Not a bit.

"Q. You do not remember ever having talked to him?

"A. I do not remember his face.

"Q. In fact, you do not recall any members of the crew except the officers?

"A. Yes, sir.

"Q. You do?

"A. I remember sailors.

"Q. Some of their faces?

"A. Yes, sir.

"Q. But you do not remember their names?

"A. I am sure I would recognize the names of them.

"Q. How about the steward's department?

[fol. 66] "A. If they had been there any length of time I would recognize their names and faces.

"Q. But you do not recall this man?

"A. No; only his name.

"Q. You have no idea what he looked like?

"A. Not a bit. I have tried to recall his face but I cannot recall it.

"Q. They loaded cargo right up to the moment of sailing, didn't they?

"A. Yes, sir.

"Q. As soon as the ship is loaded she sails, is that right?

"A. No, sir.

"Q. Isn't that right?

"A. She has a time for sailing.

"Q. The time for loading is figured up, is that it?

"A. It will be near that time.

"Q. To the sailing moment; is that right?

"A. Yes, sir.

"Q. And it is more or less of a rush job?

"A. Yes, sir.

"Q. Especially at the end?

"A. Yes, sir.

"Q. And there is a lot of cleaning up to be done after loading?

"A. Sweeping.

"Q. Especially before sailing there is a lot of cleaning up of the decks; is that right?

"A. No; sweeping the decks.

"Q. Cleaning up debris, I am talking about? Washing——

"A. No, sir; that is left until the ship is made seaworthy, the hatches battened down, and the ship is ready for sea. That is left on deck until after the ship is made seaworthy, and then it is washed.

"Q. I am talking about the debris?

"A. I realize that.

"Q. You never clean up until the moment of sailing?

"A. Until after the ship has sailed, when going out to sea; then the decks are washed.

[fol. 67] "Q. After the ship sails?

"A. You are not allowed to throw it overboard in a harbor.

"Q. So on this particular boat you never cleaned up the decks until after sailing, is that right?

"A. No, that is not right.

"Q. That is what I understood you to state?

"A. That is not what I meant to state. At the time of sailing the decks are not as important as making the ship ready for sea, but the decks are cleaned.

"Q. There are so many other things that you let the decks go until you get out to sea; is that right?

"A. That is right.

"Q. You are not as careful about the decks as you would be under other circumstances?

"A. Not on those days.

"Q. The nearer you get to sailing, I mean, you are not as careful about the decks as you are at other times?

"A. That is the system.

"Q. Is that the system you followed?

"A. Yes, sir; I could follow no other. We could not go around with brooms in our hands all the time.

"Q. You did not carry a full crew at this time, did you?

"A. We must have a full crew by law. We carried a full crew.

"Q. Before sailing?

"A. Before sailing, before the ship can clear for a foreign port; that would be in her articles.

"Q. Before she clears, while you were loading cargo did you have a full crew?

"A. I do not remember that.

"Q. You do not know whether she had or not?

"A. No, sir.

"Q. You do not remember personally giving anybody orders while this vessel was at Pier 27 to clean up the decks, do you?

"A. No.

[fol. 68] "Q. You do not remember making a personal inspection to see whether they were cleaned up?

"A. I cannot remember that.

"Q. In spite of the fact that it was your duty?

"A. In spite of the fact that I unconsciously do that all the time.

"Q. It was your duty, I say; is that right?

"A. It was my duty.

"Q. You do not recall whether you performed that dut or not?

"A. I cannot recall to swear what I did on those dates, no. The only thing is that I do it unconsciously. What I did on those dates is too far back to remember.

"Q. The men had to use that after deck to walk back and forth on, didn't they?

"A. Yes, sir.

"Q. From their quarters?

"A. Yes, sir.

"Q. And that part of the ship was used for a regular passageway?

"A. Yes, sir.

"Q. The after well-deck?

"A. Yes, sir.

"Q. On both sides of the hatches; is that right?

"A. Yes, sir.

"Q. You have discussed this case with somebody before have you?

"A. Yes, sir, with this gentleman (indicating Mr. Meagher).

"Q. Anybody else?

"A. No.

"Q. By this gentleman, you refer to Mr. Meagher?

"A. Mr. Meagher.

"Q. Did you sign any statement in the case, in writing?

"A. Yes, sir.

"Q. Have you read that over to refresh your recollection?

"A. Yes, sir.

"Q. Are you testifying from your present recollection or from your recollection as refreshed by that paper?

"A. From my present recollection because that statement of mine told that I could not recollect anything definite regarding that man.

"Q. So you signed a statement to the effect that you [fol. 69] could not recall anything in regard to these occurrences that you have testified to? That you could not recall anything about these matters you have testified to?

"—. ——.

"Q. Did you discuss this matter with any of the officers of the company?

"A. No, sir.

"Q. With any officials?

"A. No, sir.

"Q. Only with Mr. Meagher?

"A. Yes, sir, only with Mr. Meagher.

"Q. When did you first know you were going to be a witness in this case?

"A. Yesterday morning when we docked.

"Mr. Graves: That is all.

"Redirect examination.

"By Mr. Meagher:

"Q. And about how long did you discuss this case with me, Mr. Burrows?

"A. I should say five minutes because you were talking over the telephone most of the time."

Mr. Crawford: May it be noted that the questions here asked by the other side. My opponent is reading from a deposition. He has a right to read every question in the deposition. If he reads it it is his question.

Mr. Graves: I cannot read and ask if he has discussed it with me without asking the question. I have a right to find out who he is referring to.

Mr. Crawford: Then say referring to Mr. Meagher. It is not my question. It is your question.

"Q. How long was the 'Frances Weems' in port here at New York on this occasion?

"A. I cannot recall exactly but it was about three days. [fol. 70] "Q. Now, you said in answer to Mr. Graves's questions that as the time of sailing approached you became less and less concerned about the condition of the deck. Did you mean to convey by that the impression that at the end of the first day you were very careful about the condition of the deck, and at the end of the second day you were less careful about the condition of the deck, and at the end of the third day you were absolutely careless about the condition of the deck?

"Mr. Graves: Ob[illegible]ted to as incompetent, irrelevant and immaterial."

(Question unanswered.)

"Q. Just what did you mean by that statement, that as the time of sailing approached you became less concerned about the condition of the deck?

"Mr. Graves: Objected to as incompetent, irrelevant and immaterial.

"A. I never meant that at any time I became less concerned about the condition of the deck.

"Q. What did you mean?

"Mr. Graves: Objected to as incompetent, irrelevant and immaterial.

"A. I meant that at and around sailing time it was impossible for me to be as careful about the condition of the deck as it would have been at any other time.

"Q. When you say 'at and around sailing time' what do you mean?

"A. I mean from one hour before leaving the dock until the ship is completely prepared for entering upon the high [fol. 71] seas.

"Q. And about how many hours in all would that be, one hour before leaving the dock until the ship was completely prepared for her voyage?

"A. In New York, two hours.

"Q. Altogether?

"A. Altogether.

"Q. So you would be less concerned about the condition of the deck an hour before sailing and approximately an hour after?

"A. An hour before and an hour after, and then I turned my whole mind on cleaning the deck.

"Q. After that.

"A. After that one hour of preparing the hatches and derricks, the next main job is cleaning the decks.

"Q. And what about the time preceding the hour prior to sailing?

"A. Always the decks are of the utmost importance with me; only under the conditions of leaving port.

"Q. So that the only time that you are not concerned chiefly about the condition of the decks is for a two-hour period?

"A. Two-hour period.

"Q. From an hour before sailing until an hour after sailing?

"A. Yes, sir; when the condition of the ship for combating seas is of the utmost importance.

"Q. Now, you spoke, Mr. Burrows, about coming back from these visits to your friends?

"A. Yes, sir.

"Q. Returning to the vessel after these visits to your friends?

"A. Yes, sir.

"Q. And, as I recall it, you stated that you had returned to the vessel anywhere from midnight to one o'clock in the morning?

"A. Or perhaps two o'clock.

"Q. Do you recall while the 'Frances Weems' was in New York returning from these visits and actually seeing [fol. 72] the lights that you referred to in your testimony burning?"

Mr. Graves: Then I said yes or no.

The Court: Never mind the argument.

"Q. And do you recall ever seeing them not burning?

"A. I must say no.

"Q. You do not recall ever seeing them not burning?

"A. I can say no to that definitely.

"Q. Now, when you returned from these visits at what point would you board the vessel?

"A. Came aboard at the gangway.

"Q. Where is the gangway?

"A. At that time on the starboard well-deck rail abreast of No. 4 hatch at the foot of the steps leading up to the amidships quarters.

"Q. And after you boarded that gangplank how would you proceed to your own quarters?

"A. I would ascend the steps that the cook had ascended, and then up to the boat deck.

"Q. In returning from any of these visits do you recall while the vessel was in New York, do you recall ever seeing the deck littered with debris?

"A. No, I do not.

"Q. Or boxes.

"A. I do not.

"Q. Or crates?

"A. I do not.

"Q. Or broken wood?

"A. I do not.

"Q. Or nails?

"A. No.

"Q. Or anything of that kind?

"A. No.

"Q. Would you have noticed it?

"A. I would. A good sailor always picks them up and throws them overboard or lays them aside.

"Q. Have you any recollection of ever seeing such debris on the decks upon your return from these visits to your friends?

"A. No.

[fol. 73] "Q. Now, you say these returns would take place anywhere from twelve o'clock to two o'clock in the morning?

"A. Yes, sir.

"Q. Is there any loading work done aboard the vessel from two o'clock in the morning until five?

"A. No; not upon that ship at that time.

"Q. There was not any during that time?

"A. There was not.

"Mr. Graves: Between what time?

"Mr. Meagher: Between two o'clock and five in the morning.

"The Witness: No.

"Mr. Meagher: That is all.

"Recross-examination.

"By Mr. Graves:

"Q. There was no loading done on that ship between five in the evening and seven in the morning, was there, at this port?

"A. I do not remember that. It may have been six. They work sometimes until six. I do not remember.

"Q. In fact, you did not do any night work on this occasion when you were at Pier 27 in February, 1930?

"A. No.

"Q. Didn't you testify that around sailing time when you were rushed you were not as careful inspecting the decks as at other times?

"A. Yes, sir, at sailing time only.

"Q. Wasn't that true at other times when you were very busy?

"A. No, sir.

"Q. What would be the difference?

"A. Because as mate of the ship I cannot pass by a stick on deck where it would be in anyone's way without picking it up unconsciously. It is a habit.

"Q. All right. Your testimony also is to the effect, isn't it, that while this vessel was at port at Pier 27, in February, [fol. 74] 1930, that you did not go on these decks between five in the evening and your return to the vessel early in the morning; is that right?

"A. No. I had to pass on that deck to go ashore and come back. I had to pass on that deck where he claims he hurt himself on.

"Q. And you say the men might have been still loading at that time; they might have worked up to six o'clock?

"A. Yes.

"Q. And it was six o'clock or a little before that you went ashore?

"A. I said about six o'clock when I went ashore.

"Q. At any rate, you do not remember exactly the appearance of the deck at any particular time, do you, in February, 1930, at Pier 27, of that vessel?

"A. Of course, I recall the appearance of the decks.

"Q. As to what was on the decks?

"A. Yes, sir, I do.

"Q. In the way of debris?

"A. Yes, sir.

"Q. Name any particular time that you saw the decks, particular time?

A. I remember the boxes and crates which the provisions came in distinctly being behind, in the corner behind the ladder; I remember that distinctly.

"Q. They were to be loaded on that ship?

"A. No, sir; they were taken off the ship's stores and put there in the corner.

"Q. They were carried along that deck there, weren't they?

"A. No, sir, they were passed out the doors and right around the corner of the door.

"Q. And put out on the deck?

"A. In the corner of the deck.

"Q. But there was debris on the deck at various times when these men were loading cargo?

"A. Yes, sir.

[fol. 75] "Q. But you do not remember any particular moment what that debris looked like or any piece of timber looked like?

"A. No, only the stores, that pile of pieces of box that were in that one corner.

"Q. There were boxes of stores on the deck, were there, on the after main deck?

"A. No, sir, there were parts of boxes.

"Q. Broken boxes?

"A. Broken boxes.

"Q. Lying on the deck?

"A. In the corner, on deck in a corner, not on the deck.

"Q. That is, you noticed that in a corner?

"A. Yes.

"Q. You did not notice whether there were any anywhere else?

"A. No.

"Q. And there were broken boxes there, were there?

"A. On that day the stores came aboard.

"Q. Broken crates?

"A. Yes.

"Q. And do you remember what particular day that was?

"A. I do not.

"Q. Do they open the boxes up on the deck and take the provisions out?

"A. No.

"Q. But there were broken boxes lying around?

"A. No, sir, not lying around; there were broken boxes lying in the corner.

"Mr. Meagher: Just a moment. I object to the question as trying to put words into the mouth of the witness. He has testified that these broken boxes were in a corner and not around the deck.

"Q. Didn't you say they were lying around when I asked you whether there were any broken boxes on deck?

"A. I said lying in the corner.

"Q. They were lying on the deck, weren't they?

"A. They were lying in a corner of the deck, which in [fol. 76] this case would be a steam pipe cover; not a steam pipe cover, a steering chain cover.

"Q. What portion of the deck, forward end of the well-deck?

"A. Forward end of the well-deck.

"Q. Where you go into amidships?
"A. Yes.
"Q. Amidships somewhere?
"A. Yes.
"Q. Amidships superstructure?
"A. A corner about this large (indicating).

"Mr. Graves: Indicating six feet square?
"The witness: No.
"Mr. Meagher: No.
"The Witness: I would say about two and a half to three feet.

"Q. How large a spot?
"A. About three feet.
"Q. Were these broken boxes piled on top of each other?
"A. Yes, sir.
"Q. Broken crates?
"A. Yes, sir.
"Q. Did you notice any ends sticking out?
"A. No, I did not.
"Q. Did you examine it to see whether there were any ends there?
"A. No, sir, because in the position that it was in it was out of the way behind the ladder.
"Q. In the doorway?
"A. No, sir; alongside of the door.
"Q. How far from the door?
"A. Three feet.
"Q. Three feet to the right?
"A. To the left, facing the door, behind the ladder.
"Q. So this was on the starboard side, was it?
"A. On the starboard side.
"Q. What is the distance from the door on the starboard side in these amidships superstructure, the distance from the right hand jamb of the door to the rail?
"A. I would say eight feet.
"Q. And these broken boxes were piled between the doorway and the rail?
"A. Against the rail.
[fol. 77] "Q. And against the superstructure?
"A. Yes, sir.
"Q. Making them about four or five feet from the door?
"A. Yes, sir.
"Q. How many boxes were there?

"A. I do not know how many.
"Q. Quite a few, weren't there?
"A. No, I should say about four or five.
"Q. Do you know how long they remained there?
"A. How long they were? You mean, how long in construction the boxes were?
"Q. No; how long they remained there at that spot?
"A. Until the ship got to sea and then they were thrown overboard.
"Q. You did not give any instructions to have them taken away?
"A. No, sir.
"Q. Or removed to anywhere else, did you?
"A. No, sir.
"Q. You knew they were there?
"A. I knew they were there.
"Q. You never made any particular inspection to see whether pieces of these boxes were anywhere else, did you, as far as you recollect?
"A. No, I cannot recollect that.

"Mr. Graves: That is all.
"Mr. Meagher: That is all."

Donald Redman, the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Graves:

Q. Mr. Redman, how old are you?
A. Forty-one.
[fol. 78] Q. Where were you born?
A. British West Indies, Island of Barbados.
Q. How long did you live at Barbados?
A. I left home twenty years ago. I have been around the States about fifteen years now.
Q. How old were you when you left Barbados?
A. Somewhere around nineteen.
Q. What has been your occupation since that date?
A. Seafaring man, in the stores department most of the time.

Q. And during that time have you been practically continuously employed on board vessels?

A. Yes, sir, right along, from here to San Francisco and back to New York and all foreign countries.

Q. On February 13, 1930, were you employed anywhere?

A. On the "Frances Weems."

Q. In what capacity?

A. Storage department.

Q. What is your job?

A. Cook.

Q. How much were your wages?

A. Sixty dollars a month.

Q. Including your board and lodging?

A. Yes, sir.

Q. Have you at other times earned more money than that in that same kind of position?

Mr. Crawford: Objected to as incompetent, immaterial and irrelevant; what he earned at some other time is irrelevant here.

The Court: You can show what kind of work he did and what he has been paid, and make it specific.

By the Court:

Q. How long have you been a cook aboard ship?

A. Full cook about eight years.

[fol. 79] Q. What wages did you get during those eight years?

A. Off and on I worked for the Standard Oil of New Jersey, and I got a hundred dollars a month.

Q. How much did you get before, when you were hurt?

A. Sixty dollars.

Q. Sometimes you got $100 a month?

A. Yes, sir.

Q. Would your work be steady?

A. Always steady, yes, sir.

Q. Always steady?

A. Always steady, yes, sir.

Q. Did you sign ship's papers for every trip separately?

A. Yes, sir.

Q. Every trip?

A. Before the commissioner.

By Mr. Graves:

Q. You say you were employed on February 13, 1930, on board the "Weems" as cook?

A. Yes, sir.

Q. How many men were in the steward's department?

A. Me and the steward and two others.

By the Court:

Q. How long had you been on that ship in Baltimore, Maryland?

A. 14th day of January, 1930, I joined the "Frances Weems" and made a trip to Charleston and the Coast; came back to Alexandria, Virginia. She brought back phosphorus rock; discharged it in Alexandria, Virginia, and proceeded here to New York. I don't know what day she got in; she came here to load cargo for San Domingo and Porto Rico.

Q. You were on the ship a month before that day?

A. Not quite a month. I think I was, however, in Alexandria, Virginia, eighteen days or seventeen; I am not positive. Then we started from there to New York and she paid [fol. 80] off and signed on men before the United States Commissioner for San Domingo and Porto Rico.

Q. Where were your quarters on the "Frances Weems?"

A. Back aft.

Q. That is your living quarters?

A. Yes, sir.

Q. Where were your working quarters?

A. Coming forward on the ship.

Q. In the midship superstructure?

A. Yes, sir; upstairs abaft the smokestack.

Q. How did you go back and forth between those two spots?

A. You come by the upper part and come down the stairway like this, a ladder on the starboard side or port side.

Q. Are there ladders on both sides?

A. Both sides. Then there are two divisions; you can go this side or that side, and then you go around. The steering gear is connected from the wheel and you then go on and get in your quarters.

Q. From the deck on which the kitchen is you go on the lower or main deck by ladder?

A. Yes.

Q. And there is a ladder on the port and starboard side?
A. Yes.
Q. Then you walk on the deck?
A. On the deck.
Q. You walk aft?
A. You have to walk on the deck.
Q. How far aft must you walk?
A. I couldn't imagine the feet, but it is quite a walk.
Q. Quite a walk?
A. Yes, sir. I consider myself from the stairway to the principal deck, back to where those lights are—I don't know—from this distance here when you leave your engine——
Q. You got to walk on the deck?
A. Yes.
Q. Is there a door on both the starboard and port side?
A. One door.
Q. On which side of the ship is that?
A. On the port side.
[fol. 81] Q. You have to go up to the port side?
A. No, the stairs are on the starboard side, then you go into the cook's—the mess man's quarters, and on the other side you go to the firemen's quarters.
Q. But to get to your quarters you have to go to the port side?
A. Yes.
Q. Then you go up steps?
A. Yes.
Q. And you go down the steps to your quarters?
A. Yes.
Q. Would you say the distance would be about 35 or 40 feeet?

Mr. Crawford: About 40 feet.

(It is stipulated the distance is 40 feet.)

Q. In that aft well-deck were there hatches?
A. Yes, there were two hatches there; I am quite sure of that.
Q. And you have to pass on one side or the other of those hatches?
A. Yes, sir.
Q. And as you walk to the midship structure——

The Court: He will tell us.

Q. How would you go?

A. When you come out from your quarters you come out on the well-deck. Then you walk to the ladder to get to where the kitchen was. You have to go up this ladder on either side.

Q. There are two ladders there, port and starboard?

A. Yes.

By the Court:

Q. When you go up on the deck and have to walk to the ladder, are there hatches there?

A. Yes, sir.

[fol. 82] Q. How many?

A. Two hatches, if I am not mistaken.

Q. Between the ladders and the door that lead to the space?

A. Yes, sir.

Q. Two hatches?

A. Yes, sir.

By Mr. Graves:

Q. Do you remember the 13th day of February, 1930?

A. Yes, I was aboard the "Frances Weems".

Q. What time did you get up that morning?

A. The witchman calls the cook at a quarter to five so he would be on the deck at five.

Q. What time did you get on deck that morning?

A. Five o'clock.

Q. Was it light or dark?

A. No lights whatsoever.

Q. Were there any artificial lights burning?

A. No lights; no, sir.

Q. Was the aft well-deck — or light?

A. Dark.

Q. What was the weather?

A. Misty.

By the Court:

Q. What did you do when you got up that morning at a quarter—you dressed?

A. Dressed.

Q. What did you do then?

A. I came out on the well-deck to proceed forward to the kitchen.

Q. Was there any light in other quarters?

A. Yes.

Q. Any light on the steps?

A. No, when I came on the well-deck where the ladder was there was no light burning whatsoever.

Q. After you left your quarters did you see any lights burning on the ship?

A. Didn't see any lights whatever.

Q. The last light you saw on the ship was in your quarters?

A. In my quarters.

[fol. 83] Q. Did you see any other lights?

A. No other lights.

Q. Did you have a light to light yourself when you got out of your quarters?

A. No, I didn't have any light.

By Mr. Graves:

Q. Which side of the hatch did you go?

A. Starboard side.

Q. How many feet did you go before anything happened?

A. Well, I got just down near the hatch.

Q. Tell the jury what happened?

A. Just as I came out the weather was bad, couldn't see, and I walked to the end of the ladder, I kind of tripped, stumbled over some broken boxes; I couldn't see at the time; it was cloudy, and I held on to the ladder and this foot fell over the boxes. I felt a sharp pain in this foot.

Q. Where did you feel the pain?

A. Right here (indicating). I had a low shoe on at the same time. (Witness indicates right foot.)

Q. Tell us in your own way.

A. The nail went right in there and I felt a sharp pain. I couldn't see right away; I had to hold on to the rail. I actually held the rail like this (indicating), and I bent over. I couldn't see but very little, and I pulled something like that. I wondered what it was, and I felt a piece of the box, and I could discern the shape of the nail. I just threw it by the side of the ship and went on upstairs.

By the Court:

Q. What was it you pulled off; wood?

A. No. on the end of the slat was a nail.

[fol. 84] Q. Did you see the nail?

A. I could see it, not altogether discern it or how large it was at the time, but you could feel the shape of it at the end of the box.

Q. You are sure you took wood from your leg?

A. Yes.

Q. Was there also a nail?

A. Yes.

Q. Did you see the nail?

A. Yes.

Q. Tell us what you saw?

A. Then I took it and throwed it.——

Q. What did you pick up?

A. The slab of a box.

Q. How big was that piece that you picked up?

A. Little wider than that (indicating width of hand), like a crate with hinges on; something like that.

Q. Couldn't see the slab?

A. The slab consisted of about three or four inches.

Q. Show the jury about how big the piece of slab was.

A. It could be a piece of about that length from here to there (indicating about three feet).

Q. Then you took that away and threw it where?

A. I threw it on the side of the ship.

Q. Show us how you took it from your foot?

A. I bent over like that (indicating). I couldn't see very well, but I could feel something sharp. I discerned the nail at the end of the slat and I threw it on the side of the ship.

Q. Are you sure you could see the nail?

A. You could not discern it so well, but you could feel it.

Q. Did you see it?

A. Yes, I could see it.

Q. Was it in the wood?

A. In the wood, connected with the end of the wood.

Q. Show us where the nail was?

A. The nail was at the end, just like that.

[fol. 85] Q. How far did it come out?

A. I don't know.

Q. Was it a big nail or small?

A. Small nail. I couldn't tell you what box the slat came from, whether eggs or oranges, but it was a thin slat.

Q. How far did the nail come out from the slat, the end of the nail?

A. The end of the nail was like that, from the box (indicating).

By Mr. Graves:

Q. You say the end of the nail projected from that slat?

A. Yes.

Q. And you indicated you held that slat to your face?

A. Yes, I held it up.

Q. And saw the nail?

A. And saw the nail.

Q. The nail was sticking out——

Mr. Crawford: I object to Mr. Graves testifying.

The Court: Let him tell the story, just what he saw.

By the Court:

Q. What kind of shoes do you wear?

A. Just like that, low shoes, just like I have on.

By Mr. Graves:

Q. What did you do then?

A. After throwing the slat alongside the ship I went up the ladder and went to the kitchen. There was a light in the kitchen. I took the shoe off and the sock, and it bled. I took a clean rag; we generally have clean rags in the kitchen. I took a little hot water and put it on and continued my work. At the time I thought nothing more, because I never had any accident on a ship yet.

[fol. 86] Q. Where was the blood coming from?

A. Right here where the nail was.

Q. Right there at the top of the shoe?

A. Right here; see, the ankle; that is where it went.

Q. Right at the top of the shoe?

A. Yes, sir.

Q. Where the sock joins the shoe?

A. Yes.

Q. Is that the same place that you felt the pain?

A. The same place where I felt the pain a few days after.

Q. What did you do then?

A. I continued my work right on.
Q. All day?
A. All day, yes.
Q. When did you next go down on the well-deck after washing your foot and washing the blood off?
A. After six o'clock I went and it was cleaned up. When I went out on the deck I saw all these boxes lying around there and two or three boxes crushed with nails in them. I did not think—I said to myself——

Mr. Crawford: We don't care what he said to himself.

By the Court:

Q. When you came down you saw boxes about?
A. Three boxes.
Q. Tell the jury where you saw these boxes?
A. I saw those boxes and walked away to get to the ladder, passageway to the ladder.

By Mr. Graves:

Q. Describe those boxes?
A. Some were whole and about two of them was broken out.
Q. See any nails in those boxes?
A. Yes, sir, the broken boxes was filled up with nails.
[fol. 87] Q. Crushed up?

The Court: Don't lead him. If I were trying the case I would let the witness tell the story. The jury want to hear the witness's story, they don't want you to tell the facts. If I were trying the case I would let him tell his story.

Q. Just tell us what you did then?
A. I took those boxes and put them aside of the ship myself.
Q. Where did you place them?
A. Right on the ship's starboard.
Q. What did you do the rest of that day?
A. I worked right on up to about seven o'clock that night.
Q. Did you go ashore that night?
A. No. I didn't go ashore that night.
Q. Did you notice anything about your foot that day?

A. No, that day the foot was actually the same way, nothing sore or wrong with it that day.

Q. What time did you get up the next morning?

A. Five o'clock; the same hour.

Q. Did you look at your foot the next morning, the 14th?

By the Court:

Q. Was the ship at the pier?

A. Yes, sir.

Q. Did you live aboard the ship?

A. Yes, sir; I didn't go ashore. In the morning when I got up the watchman turned the light on, and when I got dressed I noticed my foot swollen and discolored in the same direction where the nail went in. This discoloration came from there and it was swollen. At that time no sharp [fol. 88] pain came from it. I put my clothes on and went to work just the same.

Q. Did you work that morning?

A. Yes, sir, worked right on.

Q. Tell what happened that morning?

A. After getting breakfast and the steward came around and everything was O. K., he came around about six-thirty. I said I came out yesterday morning and a nail ran into my foot, I didn't think anything serious, and I noticed this morning it is discolored and red; so he suggested liniment.

Q. What did he say to you when you told him that?

A. He suggested liniment.

Q. What did he say about liniment?

A. He said I will give you liniment.

Q. Did he give you liniment?

A. No, he didn't get none.

By Mr. Graves:

Q. Tell everything else that happened that day?

A. After he didn't get any liniment, I was on the deck on the 14th receiving stores for the ship's voyage. This was about ten o'clock or ten-thir[illegible]. A doctor came aboard the ship to examine the crew before the voyage, so he came to the kitchen and said who is going on the ship go past the doctor. The steward, George Ramsey, said, I will go up and see the doctor first.

The Court: Did you know the doctor who was examining the crew?

The Witness: Yes, he told me.

Q. Did you go to see the doctor?

A. He said I will go up and see the doctor first. Then I came down and stayed in the kitchen and was looking after [fol. 89] the work, and he said you go next. I said I would like to show the doctor and see what he thinks of it. He said I haven't much time; he said, go ahead, be examined by the doctor, and when the doctor gets through inspecting the crew you can tell the mess boy—the captain meant when the doctor is there—and then you can go up and have him examine your foot.

Q. Did the mess boy come and tell you?

A. I didn't see the mess boy come, and saw nothing, so I went myself. I said, did the steward tell you anything to tell me? He said, yes, but I was in the captain's room working, and by that time the doctor was ashore, and I didn't see the doctor.

By Mr. Graves:

Q. Did you then continue your work?

A. Yes.

Q. Did you see the steward next day?

A. I asked him did he receive any liniment. He said I don't know, all the stores isn't aboard yet, but later in the evening I will look around. I continued with my work and didn't receive no treatment.

By the Court:

Q. What did you do that night—did you go ashore after your work was done?

A. I went back after he said he had no liniment and didn't get no liniment. I said, I think I will go ashore and buy some my own self. He said, are you going ashore? I said, yes, I am going ashore, I am going to buy some stuff for my foot, liniment, and he said, all right; I will go along with you, and the steward, George Ramsey, came along.

Q. What time did you leave the ship?

A. About eight-thirty.

[fol. 90] Q. Where did you go?

A. We took a crosstown line and went to Willoughby and Hudson Street. The steward said, do you know any place where I can get a haircut. I said, yes, I know a barber. The barber was busy, so we had to wait about half an hour, and we both got a haircut there, and went to the drug store. He was with me when I bought the stuff.

Q. Where did you go from the drug store?

A. We went to a restaurant. He said, I am going to get something to eat, after we came from the drug store. We stopped in a restaurant. He said we are going to have something to eat. I said, I don't feel very good, I don't want anything to eat. I sat with him. He sat and ate then and I came out. At the time my foot kind of hurt me a little.

Q. Did you go back to the ship then?

A. No, I didn't go back that night. I said, I don't think I'll go back to the ship, I will get a room and sleep ashore, my foot kind of hurts me a little. He said, tomorrow morning if your foot is worse—you come about noon, and if you cannot go with the ship, I will get a man in your place, and you can go to the Marine Hospital.

Q. Where did you go?

A. I went to a room.

Q. What is it, a hotel?

A. Yes, the Fulton Street.

Q. Whereabouts was it; do you know the number?

A. No, I don't know the number.

Q. Did you go there before?

A. No, I didn't go there before.

Q. First time in your life?

A. First time.

Q. Been there since?

A. No, I haven't been there since.

Q. How long did you stay there?

[fol. 91] A. Slept there that night and this liniment I had to apply on my foot.

Q. What did you do the next day?

A. In the morning the foot was swollen more and discolored; I could hardly get the shoe on; I felt so bad I didn't know what to do, so I didn't wake until noon time, maybe twelve o'clock, because I was kept awake with sharp pains at night and I couldn't sleep. Later, after the pain died out, I fell asleep. Then I slept late and later took a taxi,

and I went down. I got out of the taxi. The pain in the foot made it kind of lame. I said to a man "Where is the 'Frances Weems'?" He said it sailed about half an hour ago. I said, "Hard luck." He said. "Do you belong to the ship?" I said, "Yes; anyone in the Bull Line office?" He said, "No, the office is closed, you won't see anyone until Saturday." From there I went to 19 President Street, near Hamilton. I stayed there four days and applied this liniment and the foot no better and I didn't like the place very well, and after staying four days there I asked one of the roomers, a seafaring man, I said, "Is there no better rooms around for a man to stay?" He said, "Yes, you can go to 32 Hamilton, but it will cost you a little more money." So I went there and stayed, and from there I went to the hospital. At that time I was worried myself because as a seafaring man I knew I would have to have a Marine Hospital slip.

Q. Did you go to the Marine Hospital?

A. No, sir, I didn't have no Marine Hospital slip. The foot was swollen and I could hardly walk.

Q. Which hospital did you go to?

A. Cumberland Street. I asked the landlord to get a policeman because—

[fol. 92] Q. You went to Cumberland Street Hospital?

A. Yes, sir.

Q. Did you see the doctor there?

A. Yes, sir.

Q. Was that the doctor that testified yesterday?

A. That was not the doctor that received me.

Q. Do you know the name of the doctor who received you?

A. I am not certain that it was him, but the doctor that received me at the time; I had high fever and the foot was swollen.

Q. Did you stay in the hospital then?

A. Yes, sir.

Q. Did he let you stay in the hospital?

A. Yes.

Q. How long did you stay there?

A. 21st of February to 4th of June, in Cumberland Street Hospital.

Q. Tell the jury what happened in the hospital?

A. After being operated on, the investigators came around, and after the leg was taken off they asked me if I had any money in the bank, or if I had any income or family.

Mr. Crawford: He is talking about a conversation with some investigators. I don't know who they are.

The Court: Tell us what they did to you personally at the hospital?

The Witness: After being in the hospital, first they gave me a bath, and then on Monday I think I was taken up for an operation.

Q. Did they give you anything to put you asleep?

A. Not at that time.

Q. Tell us what they did in the operation?

A. Operated on me.

[fol. 93] Q. Whereabouts?

A. (Witness indicates thigh.)

Q. Did they cut you open there?

A. To operate on this leg they put me to sleep. I didn't understand you the first time.

Q. That is the first operation; put you to sleep.

A. Yes.

Q. When you awoke up did you have pain?

A. I should say I did.

Q. Tell us all that happened; is that the only place they cut open?

A. Right here on the thigh and then they took the leg off—not right away.

Q. Where did they cut you open the first time?

A. Here (indicating thigh).

Q. Is that the only place?

A. Only place.

Q. Then you went to bed again?

A. Yes.

Q. How long did you stay in bed before they took off your leg?

A. Stayed in bed up to—about two months.

By Mr. Graves:

Q. You stayed in bed until you left the hospital?

A. Yes, sir.

Q. What did they do in April to you?

A. In April they consent that the leg was blood poisoned, and there was no use to try to keep it, it would never get better.

Q. What did they do?

A. Took the leg off.

Q. During the time you were in the hospital did you have pain?

A. Pain every day; sure.

Q. You left Cumberland Street Hospital when?

A. 4th of June.

Q. 1930?

A. 1930.

Q. Where did you go from there?

A. They sent me to Kings County Hospital.

Q. How long did you remain there?

[fol. 94] A. Remained there—came out the 21st of February, 1931.

Q. Now, before you left the ship on the 14th, did anyone tell you what time the ship was scheduled to sail the next day?

A. Yes, sir, the second mate, Johnson. I asked him what time do you think the ship will get away? He said the ship will not sail before three or four o'clock.

Q. What time did you get to the pier on the 15th?

A. One-thirty to two o'clock.

Q. Have you done any work since you left the hospital?

A. No work to speak of. I have to walk on this brace, and I go around and shine up a couple of automobiles to make an honest living. I cannot bend with this thing.

Q. How much do you make at a time?

A. Sometimes a dollar.

By the Court:

Q. A dollar a day?

A. Yes, sir.

Q. Dollar a job or a day?

A. Dollar a day. I cannot do simonizing.

Q. How much have you made since you were hurt?

A. I could not suggest. I make very little.

Q. $500?

A. About $250.

Q. That is all your earnings since you were hurt?

A. Yes.

Cross-examination.

By Mr. Crawford:

Q. Redman, what work were you doing on this job on the afternoon before you claim you ran this nail in your foot?

A. Cook.

Q. Did you have anything to do with these boxes of stores that came aboard?

A. No, I did not.

[fol. 95] Q. Did you see other people handling them?

A. Yes, the deck hands and the steward and the mess boys.

Q. You say they handled them?

A. Yes, sir.

(Informal recess.)

Q. Mr. Redman, are you an American citizen?

The Court: What difference does that make? The court is open to any man who has been injured.

Mr. Crawford: I was just interested in knowing. He said he was born in Barbados some place.

The Court: What difference does it make?

Mr. Crawford: Perhaps it doesn't; I withdraw the question.

The Court: It doesn't make any difference. Every litigant in this court stands on the same ground, whether white or black.

Q. Did you see the steward and the two mess men handling these stores?

A. Yes, sir.

Q. What did you see them doing with the stores?

A. When they came they put them where they belonged, dry stores and ice stores, in the same storeroom.

Q. Did they take them out of these boxes?

A. Yes.

By the Court:

Q. Did you open the crates at all?

A. I didn't help with the stores; I was working in the kitchen right along.

[fol. 96] Q. Did you open the crates?

A. Yes, they opened them on deck.
Q. Did you open them?
A. Not me; the steward and the mess boys.
Q. You never opened them?
A. No, your Honor.

By Mr. Crawford:

Q. You saw them doing it?
A. Yes, the steward and mess boys were doing it.
Q. When they had boxes to open where did they open them?
A. On deck, if it is for the ice box.
Q. What did they do with them; where did you see the boxes?
A. They opened the stores and put the stores in the ice boxes and threw the boxes on deck.
Q. What part of the deck did they throw them?
A. No particular part; anywhere.
Q. Where did they throw them on this occasion?
A. I don't know; I didn't see them that day they threw them.
Q. Did you or didn't you see them that day?
A. I didn't see them. At that time I worked in the kitchen.
Q. You went out of the kitchen sometime that afternoon?
A. Afternoon; sure, I did.
Q. And you crossed the deck?
A. Yes.
Q. Did you see any boxes on the deck?
A. Not in the evening.
Q. They didn't take boxes after nightfall, did they?
A. Yes. the steward and the mess boys were working down in the icebox after supper.
Q. In the icebox but not on deck?
A. The stores department doesn't work on deck.

[fol. 97] By the Court:

Q. Where is the icebox?
A. On the main deck.
Q. That is the deck on which you were hurt?
A. Yes, your Honor.

By Mr. Crawford:

Q. You didn't see them work on deck after dark that night, did you?

A. Yes, they were working when I left for my room.

Q. What time was that?

A. Around eight o'clock.

Q. They were still working on deck?

A. Still working, putting away stores.

The Court: What were they doing?

The Witness: Cleaning out the icebox and taking stores and putting them in there.

Q. Did any more stores come aboard after dark that night?

A. The stores were there. They were distributing them where they belonged.

Q. They were on deck before dark?

A. Yes.

Q. And all these boxes that had been opened up had been opened before dark, had they?

A. I don't know.

Q. How many times did you cross the deck that day?

A. From my quarters to the kitchen, once, that is all.

Q. What time?

A. One-thirty to two o'clock. I was in the kitchen working. I had no time to go back there.

Q. Now, what time were you in the kitchen?

A. About seven-thirty.

Q. Did you ever go out on deck after seven-thirty?

A. Yes, to my quarters after that.

[fol. 98] By the Court:

Q. When you finished work that day you went from the kitchen to your quarters?

A. Yes, sir.

Q. Were lights burning?

A. Yes, the lights were burning.

Q. Did you go out that night?

A. No, I didn't go out that night, and not on the 13th either.

Q. Did you go on deck?

A. After seven-thirty I go and never come forward any more.

Q. But the lights were burning?
A. Yes.

By Mr. Crawford:

Q. So you don't know after seven-thirty whether these boys were working or not?
A. Yes, when the boys came in my room I was reading the paper. I said what are you doing so late? He said we were working in the icebox.
Q. You didn't see them work?
A. They told me that.
Q. They told you they had been working in the icebox; they didn't tell you they worked on the deck?
A. Nobody go there but the steward and these boys.
Q. Did these boys tell you they were working on deck?
A. They didn't tell me that.
Q. You crossed that deck every morning at five o'clock?
A. Every morning at five o'clock.
Q. And the morning before at five o'clock the lights were burning?
A. Yes.
Q. And this was the only occasion you say the lights were out?
A. Since I joined the ship——

By the Court:

Q. Since you were on that ship almost a month you got [fol. 99] up in the morning and went from your quarters to the kitchen—were the lights burning every morning?
A. Yes, sir.
Q. This was the first time——
A. They were not burning. The weather was very bad; it was dark, and you could see only hardly.

By Mr. Crawford:

Q. You could just see the nail?
A. I could see the nail because when I felt the sharp shock I held on and found the slab.
Q. And this slab as you call it that the nail was in, was that this ordinary light color that boxes generally are made of with provisions in them?
A. Yes, sir.

The Court: And the color and shape?

The Witness: Yes, and the shape of an egg box, or it might be an orange box.

Q. Did it have a label on it that you know of?

A. No, sir.

Q. Did you say it didn't have a label on it?

A. No label.

Q. This slab that you say your foot came in contact with, you say had no label on it?

A. No label.

Q. Will you tell the jury exactly what happened from the time you left your quarters at five o'clock in the morning until you got in the kitchen?

A. I came out on the well-deck going towards the kitchen. It was dark; I couldn't see. Just as I get to the ladder I stumbled right over these boxes. I made a grab for the ladder and my left foot went right in these broken slabs.

[fol. 100] By the Court:

Q. How far from the ladder did you strike the slab?

A. Well, about, she could not have been more than two feet or a foot and a half. It was pretty close to the ladder at the time. I can imagine that because just when I stumbled I could just grab the rail of the ladder.

Q. As you walked down the deck and by the hatches which part of the deck did you walk, on the starboard side—did you walk along the rail or walk along the hatches?

A. Walked in the center of the deck.

Q. How could you tell you were in the center if you couldn't see?

A. You can imagine, because if you go near the rail you can touch the rail. I always walk in the center of the deck.

Q. The way you did that night?

A. Yes.

Q. If it was dark why didn't you get hold of the rail?

A. Because I know the center of the deck is clear. There is nothing in the center of the deck.

By Mr. Crawford:

Q. The center of the deck was clear the last time you crossed it?

The Court: That was the night before after you left the kitchen, after eight o'clock.

The Witness: Oh, well, when I left the deck that night I could see; it was clear.

Q. The deck was clear too, wasn't it?

A. If the deck was clear?

Q. The last time you crossed it before this five o'clock in the morning episode the deck was clear?

[fol. 101] A. Yes, the night I won't say it was clear. You could see if there was anything on the deck, you could see.

By the Court:

Q. The night before there were lights on this deck, when you got through with your work and went from your kitchen to the quarters, there was a light on deck?

A. Yes, sir.

Q. And the deck was clear?

A. The deck was clear.

Q. You say the deck was clear; were there any crates on deck?

A. Not at that time.

Q. At eight o'clock?

A. I didn't see none on deck.

Q. You say they were taking on ship's stores at eight o'clock?

A. I don't know after I went to my quarters what they took on, but the mess boys that lived in my room, and didn't come in until late, I said, what are you doing so late. He said I been giving a hand to the steward.

By Mr. Crawford:

Q. Now, tell us what happened when you were going forward in the dark; begin when you left your quarters?

A. When I left my quarters I came on deck; was going towards the ladder when I stumbled into these broken crates, broken slabs.

By the Court:

Q. How many?

A. When I came down after six o'clock there were about two boxes broken.

Q. On the deck?
A. On the deck near the ladder.
[fol. 102] Q. Which side of the ladder?
A. Starboard side.
Q. Which part of the starboard part of the deck?
A. Near the ladder, going towards the kitchen.

By Mr. Crawford:

Q. Were they on the left side of the ladder or right side of the ladder?
A. I don't know left or right; it was a starboard side of the ship.
Q. As you came down the ladder you saw those crates?
A. After I came down there was a man put them on the side of the ship, after I got this accident.
Q. You came down the ladder at six o'clock in the morning and was it at that time that you saw these crates?
A. This was after the accident that I put these crates on the side.
Q. You came down the ladder after six o'clock?
A. Yes, but there was light there and you could see.
Q. Where did you see them, right hand side of the ladder or left hand side of the ladder?
A. Coming this way would be the left hand side. It was on this side; that must be the left hand.

By the Court:

Q. You came down the ladder?
A. Yes.
Q. Then you faced aft, is that right?
A. Yes.
Q. Then the superstructure of the ship was on your right side,—do you know what I mean; your railing was on the left side; how far did the ladder extend out on deck from the structure of the ship, was it right down to the structure?
A. Yes, it was connected with the structure.
[fol. 103] Q. It was a straight ladder?
A. Yes, straight ladder.
Q. Just a few rungs into the structure of the ship?
A. I don't know how many feet it could be; not more than three to four feet.
Q. Was it a step ladder or just steps, iron rungs?
A. Iron step ladder.

Q. With a rail?
A. Rail on both sides for protection in case the ship rolls you can hold on on that part for protection.

By Mr. Crawford:

Q. And you say as you came down the ladder you noticed these boxes on the right, is that toward the hatches?
A. Toward the hatches, near the walk-away.
Q. Never mind the walk-away——

By the Court:

Q. As you faced aft were these slabs on your right or left?
A. Coming aft?
Q. Coming down the ladder and looking aft, after you left that morning, after you were hurt, where were these slabs, to the right or left?
A. No, this side.
Q. Left?
A. Left hand.

By Mr. Crawford:

Q. That is toward the rail, is that right?
A. No, that is toward the same side as the right hand going forward of the ship. If you are going forward it is on the right. Coming aft it would be left, right by the walk-away. If I am coming I cannot see. Maybe I am lucky I am alive today.
[fol. 104] Q. You say the boxes were alongside the rail?
A. I didn't tell you that.
Q. Please tell me now.

By the Court:

Q. When you came down that morning did you see any boxes or slabs?
A. Slabs and whole boxes.

By Mr. Crawford:

Q. Where were they from the bottom of that ladder, toward the rail or toward the hatches?
A. Toward the ladder, the rail of the ladder, side of the ladder.

Q. On the left side as you come down?
A. No; on the right side.
Q. That is towards the hatch?
A. Towards the hatch.
Q. They weren't directly in front of the ladder?
A. Yes, the broken slabs was where they were, in the front of the ladder.
Q. Now they are in the front of the ladder?
A. Yes.
Q. They weren't on the side at all?
A. It is like this, here is the ladder, the ladder head is there, there were broken slabs there (witness indicates).
Q. You say you were within two feet of the ladder when you fell?
A. I didn't say——
Q. You said you grabbed the rail?
A. Yes, I grabbed the rail and my foot went into the slab.
Q. Did you fall on your face?
A. No, because I grabbed the ladder.
Q. Didn't fall at all?
A. Didn't fall at all.

[fol. 105] The Court: You were near enough to grab the ladder?
The Witness: Yes.

Q. So you didn't fall at all?
A. No, I stumbled, and I grabbed the ladder and held myself up and this foot went in the broken slab and the nail went in the foot.
Q. How far were you away at the time?
A. I don't know.
Q. Did you have to give quite a yank to pull it out?
A. I could see. As I stumbled I could see the slab and the nail project, and I could see the nail.
Q. Didn't you tell us you pulled that nail out of your foot on direct examination?
A. Yes, but I don't know how far.
Q. But it was in your foot?
A. Yes.
Q. And it was still in your foot when you reached down and pulled it?
A. No, it was not in the foot, it was in the slab of the board.

Q. Was it sticking in your foot so you had to pull it out or not?

A. I didn't have to pull it out. After I get the sharp pain in the foot I pulled the foot.

Q. Pulled the foot out of what?

A. Out of the broken slab. I saw the slab with these nails in it.

By the Court:

Q. What do you mean, you picked it up; what do you mean?

A. I picked it up from the ground to see what it was. I couldn't see what was on the ground at the time.

By Mr. Crawford:

Q. How long was this nail?

[fol. 106] A. I don't know how long. It seemed to be an egg box or apple box.

Q. Was it an apple box?

A. Apple or egg.

Q. How far from the ground is an egg crate?

A. I don't know.

Q. You saw this egg crate the next morning?

A. I didn't measure it. I don't know how high it is.

Q. How high does it stand from the floor?

The Court: A crate?

Mr. Crawford: Yes. I wan't to know how big these slabs were.

Q. How big were these boxes?

A. It seemed to be an egg box, an egg crate; I don't know how long.

Q. Was it this long (indicating)?

A. An egg crate might be longer than that.

Q. Was this one longer than that?

A. The slab was just as the usual egg slab.

Q. Light wood?

A. Light wood.

Q. Light yellow wood?

A. Light white wood.

Q. You saw that at the same time that you saw the nail?

A. Yes.

Q. Now, please tell me whether you spoke to anybody that day about your foot, the day of the 13th?

A. No, I did not.

Q. And when you went out to your kitchen you say this foot was bleeding?

A. Yes.

Q. Was it bleeding very much?

A. Not very much.

Q. How much blood did you say you lost at that time?

A. No considerable amount of blood.

Q. Did it come through your sock?

A. Came through the sock.

Q. This wound was above your shoe; did you have shoes [fol. 107] or slippers on that morning?

A. Same kind of shoe as this.

Q. Not slippers?

A. No.

Q. It was above your shoe, so you didn't have to take your shoe off to look at your wound, did you?

A. Could I look at it without taking the shoe off? Couldn't clean it without taking the sock off?

Q. You took your shoe off?

A. Yes, took the shoe and the sock off and cleaned it.

Q. And put the sock on again?

A. Yes.

Q. How long did it bleed before it stopped bleeding?

A. I don't know how long. After I took a clean cloth and put it in hot water I went on with my work and in the afternoon I cleaned it again and put on fresh socks and kept on doing my work.

Q. Was there any blood on the sock?

A. There was.

Q. Covered with blood?

A. There was blood in the sock.

Q. Was the wound a puncture or long scatch?

A. It was a puncture of the skin, slant puncture.

Q. Have you any way of telling us how deep that puncture was?

A. No, I couldn't tell you.

Q. Was it a quarter of an inch deep?

A. No, it could not be; it was the skin.

Q. A long scratch?

A. Yes, scratch.

Q. Did it bleed all the way along its length?
A. Yes.
Q. All the way along its length?
A. Yes.
Q. And how long was that scratch?
A. It appeared on the foot after it——
Q. How long was that scratch on your foot; that is a simple question?

The Court: He means in measurement.

[fol. 108] Q. Was it an inch, two inches or three inches?
A. I don't know how long.
Q. You saw it?
A. I couldn't guess it; just a scratch like that.
Q. Was it that long—two inches long?
A. (Indicating inch and a half).
Q. And it was bleeding from one end to the other?
A. It was bleeding.
Q. From one end to the other?
A. Yes.

By the Court:

Q. When you took off your stocking was the stocking red with blood?
A. Yes.
Q. A lot of blood on it?
A. Yes.
Q. How did you treat the scratch afterwards?
A. I didn't put nothing on, I just took a clean cloth with some hot water and wiped it and put the sock on and continued my work.
Q. Did you put back that sock with the blood on it?
A. Yes, and after I finished——
Q. Was that sock wet with blood?
A. It was not so wet, but I put it back on and continued my work.
Q. Before you put on that sock again did you put anything over your scratch?
A. No, your Honor, just took a clean cloth and wiped it with water.
Q. Did blood come off when you wiped it?
A. Yes.
Q. A good deal of blood

A. Not a lot of blood.

Q. You said it was about an inch and a half; how long did it take to heal?

A. It didn't heal.

Q. Never did heal, did it?

A. No.

Q. Got worse, didn't it?

A. Yes.

Q. When you said it never did heal, how did it look?

A. After I changed socks and bathed the foot in warm [fol. 109] water that scratch seemed to form a kind of blister, then the blister and skin peeled right off.

Q. There was not a formation of dried blood over the scratch?

A. It was dry and then there was a blister. Then I applied the water and it is afterwards——

Q. Did you ever have blisters before?

A. Both feet were there; I never had no kind of scratch on my foot.

Q. Did you ever have blisters?

A. No.

Q. Never?

A. No, your Honor.

By Mr. Crawford:

Q. Was it a blister with blood in it or white colored blister?

A. After a couple of days the skin came right off and it formed a kind of blister, swollen like. That blister broke and another blister came.

By the Court:

Q. When it broke, what happened; did blood come out?

A. A little blood and water.

Q. Another blister you say came?

A. Yes.

By Mr. Crawford:

Q. And that stayed there as an open sore, didn't it?

A. It was kind of red.

Q. Red on one side?

A. Yes.

Q. And it got worse every day, didn't it?

A. Yes.

Q. And that particular spot was very bad at the time you went to the hospital, wasn't it?

A. Yes.

Q. So you could see it very clearly, you could see this [fol. 110] very clearly and when you got to the hospital—could you see this bad spot on your foot when you got to the hospital?

A. Yes, you could see the blister. The wound comes up with the blister; the skin rose right over that. After I used the hot water another blister came.

Q. You burned your foot with the hot water?

A. Didn't burn my foot. I used luke warm water.

Q. And when you got to the hospital you told the doctor you ran a nail in your foot?

A. When I got to the hospital—I was in here before and told him what had happened.

Q. But you didn't tell him you ran a nail in your foot?

A. No, I didn't tell him.

Q. Did you tell any doctor at that Cumberland Street Hospital?

A. At that time I was out of my mind.

Q. How do you know you were out of your mind?

A. I couldn't sleep for two days, I had high fever, and this doctor that took my statement, he don't talk very good English, and half the questions he asked me, I didn't know what he was talking about.

Q. Did you tell him you ran a nail in your foot?

A. I told him the same statement——

Q. Did you tell him you ran a nail in your foot; yes, or no; can you answer that question?

(No answer.)

By the Court:

Q. Did you tell the doctor?

A. Yes, I gave the doctor a description of how it happened.

Q. Did you tell him it was scratched?

A. Yes.

By Mr. Crawford:

Q. Did you tell Dr. Wikle that—the doctor who testified yesterday in this court?

A. Yes.

[fol. 111] Q. He talked to you about your foot and how it got that way, didn't he?

A. He never said nothing to me about the foot, just came around and examined the foot.

Q. Did you ever point to your foot and say that is where I ran a nail in my foot, to Dr. Wikle?

(No answer.)

By the Court:

Q. Dr. Wikle was on the stand yesterday and he was asked whether you ever said anything about being scratched by a nail; now counsel wants to know what the story is; did you tell him you were scratched by a nail?

A. The doctor that took my statement I told what happened.

Q. You told what happened?

A. Yes.

Q. Did you tell Dr. Wikle?

A. I told Dr. Wikle last winter how the accident happened.

Q. Did you tell him when the accident happened?

A. No. He took that part of the statement. I think it was Dr. Peres.

By Mr. Crawford:

Q. When did you discover he could not talk very good English?

A. When I went to the hospital.

Q. But is that the time you found out he could not speak very good English?

A. I couldn't understand half of what he asked me.

Q. In spite of the fact that you were delirious——

A. Yes.

Q. (Continuing:) —you now say you don't know what you told Dr. Perez?

A. Dr. Perez took my statement.

Q. You don't know whether you told him about the nail [fol. 112] or not?

A. I don't know if Dr. Wikle asked me about my foot.

Q. But you are sure you told Dr. Perez?

A. Yes; he is the man who took my statement. He said what did you do for the foot? I said a friend advised me——

Q. I didn't ask you that; when did you get paid off for this voyage?

A. Paid on the 14th.

Q. What hour?

A. Hour after I signed on, about four o'clock.

Q. Four o'clock on the 14th?

A. Four or five o'clock.

By the Court:

Q. Were you hurt before you signed on again?

A. Yes, sir.

Q. Before you signed on?

A. Yes.

By Mr. Crawford:

Q. And you signed off on the old articles at the time you got paid?

A. No, we signed on first.

Q. You signed on first and then signed off; when you signed on this voyage you had to go before the doctor on the ship?

A. Yes, I went before the doctor.

Q. Don't you know you just said on your direct examination that you didn't go to see the doctor at all?

A. I passed the doctor.

Q. Which is true?

A. Your Honor, will you please listen to my statement?

By the Court:

Q. Maybe I will be able to help you; the jury want to know the facts; the doctor came aboard ship to examine the crew?

A. Yes.

[fol. 113] Q. Did you see the doctor?

A. I seen the doctor and was examined for the foot.

Q. After you were hurt?

A. After I was hurt.

Q. After you said you were hurt on the ship and you had this accident you saw the doctor?

A. Yes, sir.

Q. And did you tell that doctor anything about your foot?

A. No, I didn't tell him.

Q. Do you remember telling the Court and jury before that somebody came down or came out from the kitchen and said the mess mate would come in to tell you when the doctor was through with the rest of the crew?

A. Yes.

Q. Then you went up and the doctor had gone?

A. Yes; the steward said to me when after I went on to be examined for the trip, the steward said, "I will go first and get examined, and after I come back you will go and get examined, and hurry back." I went and got examined and I told him about my foot. He said, "When the doctor gets through with the crew you can have him examine the foot." I told the mess boy. I went out and when he got through, the mess boy was a long while coming and I said to him, in the captain's room, where he was, "Did you tell the doctor I wanted to see him?" He said, "I forgot about it, I was called to the captain's room and was working. I didn't see the doctor." That's what I said but the doctor didn't see the foot.

By Mr. Crawford:

Q. And you didn't show it to him?

A. I didn't show it to him because he had gone ashore.

Q. He had examined you once?

A. He examined me once; examined the eyes, and so forth.

Q. Did you tell him at that time?

[fol. 114] A. No, I didn't tell him. I had to go on the deck and when the doctor gets through examining the crew then you can go up and see the doctor and he will tell you what to put on the foot.

By the Court:

Q. When the doctor came you went up and were examined?

A. Yes.

Q. Were you lined up?

A. Yes, one after another.

Q. Was the crew standing in line?

A. No, the steward's department first and then the deck department.

Q. You came up one after another?

A. Yes, I went to relieve the steward.

By Mr. Crawford:

Q. You went one by one where the doctor was?

A. Yes.

Q. And you were alone in the room with the doctor?

A. Yes.

Q. And you said it was on the 14th?

A. Yes.

Q. And on the morning of the 14th you said the foot began to hurt you worse?

A. Yes.

Q. And you didn't tell the doctor the foot was paining you?

A. No, he said, "Next, next, and had no time." I figured after the doctor was through examining the crew then I could go up and show him this foot.

Q. What time did you go ashore with Ramsey that night?

A. Around eight or nine o'clock.

Q. Did you tell Ramsey that your foot was cut or did you just say it pained you?

A. I told him what happened to the foot and he suggested liniment.

[fol. 115] Q. Did you tell him what pained you?

A. I told him what happened and he suggested liniment.

Q. You say you went ashore about eight o'clock?

A. Eight ashore, to nine o'clock.

Q. Where did you go first?

A. We took the crosstown car and went to Willoughby and Hudson.

Q. How far did you have to walk before you got to the car; the car didn't come up to the boat, did it?

A. One block.

The Court: Where was the car, right near the end of the dock?

The Witness: Yes, sir, right over by Columbus Avenue.

Q. How far did you ride in the car?

A. Rode from there to Hudson Avenue and Willoughby Street.

Q. Is that where you knew this barber shop was?

A. Yes.

Q. Did you go to the barber shop first or drug store first?

A. Barber shop first.

Q. How long were you there?

A. The barber——

Q. How long were you there; I don't care what the barber was doing; were you there half an hour or an hour?

A. Maybe an hour.

Q. Did you get anything besides the haircut at the barber shop?

A. That is all we got.

Q. Where did you go from there?

A. To the drug store.

Q. How long was that?

A. Fifteen or twenty minutes.

Q. Did you walk from the barber shop to the drug store?

A. Yes; about a block and a half to two blocks.

[fol. 116] Q. Where did you leave Ramsey?

A. Left him at Hudson and Willoughby Street.

Q. What time do you suppose that was?

A. It was around eleven o'clock.

Q. That is about the time you decided you would stay the night in Brooklyn?

A. Yes.

Q. Sure?

A. Yes.

Q. Where did you go after Ramsey left you?

A. I went——

Q. You are at Hudson and Willoughby; where did you go from there?

A. I went to Fulton Street and slept there in a rooming house.

Q. Did you walk along the street looking for a rooming house?

A. I didn't have far to go.

Q. You knew where this place was then?

A. I knew there was rooming houses there because I had passed in the street car before.

Q. You had seen this house before?

A. Yes, the house where I slept I had seen.

Q. Were you drinking that night?

A. No, sir.

Q. Do you remember when you got to the hospital you told Dr. Peres you had done considerable drinking?

A. I don't know anything about that.

Q. You had been drinking, had you not?

A. I wouldn't tell a doctor that.

The Court: Do you drink.

The Witness: I won't lie, I do take a drink.

The Court: Do you get drunk?

The Witness: I don't use tobacco and never crave for drink. I admit I take a drink like any person. That night the steward was with me right along, and when he left me I was quite sober.

By Mr. Crawford:

Q. You were quite sober?

A. Yes.

[fol. 117] Q. You had had one drink?

A. Had nothing.

Q. After you left Ramsey?

A. After Ramsey left me I went and got a room and went to bed. I had the liniment with me. He said "I am going aboard." I said, "I don't feel well on board the boat, the room is cool and I am going to get a room and will come down tomorrow."

Q. We have had that before; you went to a perfectly strange rooming house; how far away; half a mile?

A. The boat was at Brooklyn. Fulton Street is more than a mile.

Q. And yet you went to this perfectly strange rooming house and stayed alone?

A. The reason I went there was because the room was no good, iron floor and no heat.

Q. And yet you signed on for another voyage?

A. We just came from Florida.

Q. Just answer my questions; don't keep making speeches.

The Court: Don't characterize that.

Q. The next morning what time did you wake up?

A. Noon.

Q. You slept from eleven o'clock to noon?

A. No, I didn't sleep all the time.

Q. Did you go right down to the ship as soon as you woke up?

A. Yes.

Q. What time do you think you got there?

A. By my estimation around one-thirty to two o'clock.

The Court: What time did she sail?

The Witness: The steward said the ship would not sail until three o'clock. The man at the gate said the ship sailed half an hour ago.

[fol. 118] Q. You were supposed to be on duty the next morning, weren't you?

A. Yes.

Q. And you didn't get there until one-thirty to two; is that right?

A. Yes.

Q. And you tell the Court and jury you didn't have anything to drink that night?

A. No, we don't have anything to drink.

Q. Did you tell Dr. Perez you had plenty to drink lately?

A. No.

Q. You mean to say you never told Dr. Perez you had been drinking?

A. No, I didn't tell him. He asked me "Are you a drinking man."

Mr. Crawford: I don't want to hear any more.

The Court: You have a lawyer; he will protect you.

Q. What did you do when you got down to the ship and found it was gone?

A. When I got to the ship and seen it was gone—the taxi I was in—I said "Where do you go for cheap rooming house." He said, "All right; I will take you up to 19 President Street", and I went there and stayed four days.

Q. What time did you get there on this first day, on the 15th?

A. 15th, in the evening, after the ship went.

Q. What time did you get there?

A. Two-thirty to three o'clock.

Q. Did you do anything else that afternoon?

A. No, sir.

Q. Did you go to bed?

A. I stayed there; I didn't go to bed right away.

Q. What did you do?

A. I took a room and stayed there, stayed in the room.

Q. What did you do?

A. I didn't do anything.

[fol. 119] Q. Just sat in a chair?

A. Sat in my room, because at that time I had sharp pains in the foot.

Q. Did you read?

A. I didn't read; I had nothing in the room to read. I just stayed there until it was time to go to bed.

Q. Then you went to bed, is that right?

A. Yes.

Q. Have anything to drink or not?

A. No, nothing at all.

Q. And what time did you go to bed and get up the next morning?

A. Generally I get up about nine o'clock.

Q. What did you do when you got up?

A. I sat in the room, because my foot had sharp pains.

Q. Did you try to go to the hospital then?

A. No.

Q. You had a discharge in your pocket from the ship?

A. No.

Q. It was given to you?

A. No; the Coastwise don't give us no discharge.

Q. You know you could have gone to the hospital and told them you were on the ship——

A. Being a stranger in New York I didn't know how.

Q. But you have been in New York many times, on ships?

A. Yes, but I didn't live in New York. I said to a fellow "How do you get to the Marine Hospital?" He told me; I have to go some place.

Q. Then you did think of going to the Marine Hospital?

A. Yes, I wanted to go there.

Q. But you didn't go?

A. There is no way I could get in because I didn't have no discharge.

Q. You know as long as a sailor has been on a ship a month or so he could get in; you know that, don't you?

A. I don't know the rule so I cannot say yes.

Q. Did you go out of the boarding house on the 16th?

A. No, sir; stayed there four days.

[fol. 120] By the Court:

Q. You say you left the rooming house, and they told you it sailed half an hour before; did you expect to go on the ship again?

A. Yes. All I could see was men out of work here. I wouldn't want to leave the ship to come here and walk around the shore.

By Mr. Crawford:

Q. Did you ever leave that boarding house to go to another boarding house?

A. Yes. I stayed there from the 15th to the 19th.

Q. Then what?

A. I went to 32 Hamilton.

Q. When you got to 32 Hamilton did you ever leave that place?

A. No. On the 21st I went to the hospital.

Q. Redman, when you got out of the hospital, do you remember taking up your case with your employer, the defendant, Bull Steamship Company?

A. Yes, I went up there.

Q. You wrote them a letter?

A. I didn't write a letter first. I went up there first, and they sent me to 45.

Q. Do you remember what date it was you went up there?

A. No, I can't recall.

Q. You wrote a letter to somebody, either at Bull Steamship office, or at 45, as you call it?

A. Yes; 45.

Q. You wrote that letter?

A. Yes.

Q. In connection with your case?

A. Yes.

Q. Did you mention having run your foot on a nail in that letter?

The Court: Show him the letter.

[fol. 121] A. Let me see that letter. I don't know if that is the letter I wrote.

Mr. Graves: I object to interrogating the witness about the contents of a paper not in evidence.

The Court: He need not prove the letter. You cannot ask for the contents; you can ask whether he did something. Is that your handwriting, Redman?

The Witness: Yes, that is my handwriting.

Q. Is that your signature?

A. Yes, that is my signature.

Mr. Crawford: I offer this letter in evidence.
The Court: Show it to your adversary.

(Recess.)

After Recess

2:15 P. M.

Mr. Graves: No objection.

(Marked Defendant's Exhibit A and read to the jury.)

By Mr. Crawford:

Q. Mr. Redman, will you give me the exact address of this boarding house in Brooklyn where you said you went about eleven o'clock on the night of the 14th, after you left the Steward, Ramsey?

A. I don't know the number.

Q. Didn't you give it to us on direct examination as 19 [fol. 122] President Street?

A. No, the night I left Ramsey I slept in Fulton Street.

Q. What number?

A. I don't know the number—rooming house.

Q. Near what street?

A. It was on Fulton.

Q. It is near some other street, isn't it?

A. When you come out from Willoughby you come into Fulton.

Q. What floor did you sleep on; first floor?

A. Yes, I think the first floor.

Q. Did you register when you went in the place?

A. No; he just asked my name and I paid 35 cents and took the room.

Q. On the first floor?

A. Yes.

Q. Now, when you left the ship in a taxi you asked the taxi driver for some place to go?

A. After the ship sailed.

Q. That is what I am talking about.

A. President Street; 19 President, and Hamilton.

Q. What is it—19 President or 19 Hamilton?

A. 19 President, near Hamilton.

Q. That is the place the taxi driver told you to go?

A. Yes, he took me there.

Q. What place did you sleep there?
A. First floor.
Q. Did you know the proprietor's name there?
A. Yes.
Q. What is the fact?
A. A lady runs it, Madam Cooley, an Italian lady.
Q. Does she still run the place?
A. Yes, she still runs the place.
Q. Did you sign the register when you went there?
A. No; you pay 35 cents, and she books your name.
Q. She took your name and put it in a book?
A. She put the name down.
[fol. 123] Q. How many days did you stay there?
A. Four days and four nights.
Q. You never left the place once?
A. No, I didn't go out at all.
Q. This night when you went out with Ramsey, the night of the 14th, you had some friends in Brooklyn you were looking for?
A. No friends.
Q. You went to some house with Ramsey and tried to find some friends?
A. No friends, a ship mate, a steward of a ship on the same line.
Q. You went to see him?
A. It is about one block from where the barber shop was.
Q. Did he live there?
A. He left there.
Q. Family?
A. No family; he is a single man, he occupied a room there.
Q. You never went to that place to stay?
A. No; when I rang the bell, Ramsey was with me, 82 Hudson Avenue, the lady came and said "Who is that?" I said "A friend from the Bull Line is there, was Costiger there?" She said, "No, he is on the Ward Line now."
Q. Did you go to barber shop and try to find where this fellow was?
A. No, we had been to the barber shop and the drug store and was on our way home.
Q. Did you go to a tobacco shop that night?
A. The time we went to the tobacco shop was next to the drug store.
Q. You did go to the barber shop?

A. It is next to the drug store.

Q. It is not the same place?

A. Here is the drug store and here the tobacco store.

Q. You are admitting how that you went to the barber shop, the drug store and to a tobacco store?

A. Yes.

Q. What is the first time you ever were treated for syphilis?

[fol. 124] A. I never was treated for syphilis in my life.

Q. You were treated in the Cumberland Hospital for syphilis, weren't you?

A. After being operated I was transferred up there.

Q. You were treated for syphilis?

A. After Cumberland Street Hospital they transferred me up there.

By the Court:

Q. Were you at hospitals before you went to the Cumberland Hospital?

A. No, your Honor.

Q. Never in your life?

A. Once in the Republic of Panama, with fever.

Q. Ever in a hospital before or after that?

A. No, sir; this is the first time in my life. I have been sick before that time with fever, until I had this accident.

Q. You had never seen a doctor before?

A. No, sir; only on board ships, examinations.

Q. Did you have examinations on board ship?

A. Yes, sir, for venereal disease.

Q. Did the doctor always say you were well?

A. Yes, sir, always say I was well, never complained of no pains whatsoever.

By Mr. Crawford:

Q. You never told these ships doctors you had a venereal disease, did you?

A. No.

Q. When was the first time you knew you had a venereal disease?

A. I don't know now. My blood was 4 plus until I had this accident, on the ship, when the doctor came around and asked me. I told him no. He said "Your blood is not

right." He says "It is 4 plus." I don't know the meaning of 4 plus.

[fol. 125] Q. Did you ask him what 4 plus meant?

A. Yes, I asked him.

Q. What did he say?

A. He said that stands for venereal disease; "have you ever been in a hospital for venereal disease."

Q. Did you ever have a venereal disease?

A. No, sir.

Q. Never had a venereal disease?

A. No, sir, I was examined by the Shipping Board in 1929, I got a record there when I signed for the Bull Line for South Africa.

Q. When did the doctor tell you the first time you had 4 plus?

A. When I was in the hospital. I didn't know what 4 plus meant.

Q. Since you had your operation on the leg did you ever go to see any other doctors?

A. No, sir, this same doctor sent me a letter to come to Cumberland Street to see how the wound was. I was out on service that day. I took the letter and went to Cumberland Street and showed it to the head nurse there. She said "Do you feel all right in the foot?" I said "All right; I cannot do no painting." The doctor said "I will get you another man", I can't remember his name, "to see how the wound is. If you wear an artificial foot don't worry."

Q. You said outside of that experience in Cumberland and Kings County and once when you had fever you never were in a hospital?

A. No, sir. I get the fever down in Panama, and I stayed in the hospital ten days. They gave me a lot of quinine and I have never been sick since. After that this accident came. I can go to the Shipping Board——

Q. Did you ever ask anybody what to do because your blood was 4 plus?

A. I didn't know about 4 plus until I was sick with the leg.

[fol. 126] Q. How many years is that?

A. 1930.

Q. Did you ever ask anybody else about your blood?

A. I never felt sick and was troubled with no pain so I never did take a blood test.

Q. And the only time there was a blood test was when?
A. In the hospital.

JAMES H. SCARR, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Graves:

Q. Where do you live?
A. Hasbrouck Heights, New Jersey.
Q. Mr. Scarr, are you in charge of the United States Weather Bureau here in New York City?
A. I am.
Q. Have you records for 1930 with you?
A. I have.
Q. Can you tell us what time the sun rose on the 13th of February, 1930, here in New York City?
A. Yes, the sun rose at 53 minutes past 6 A. M.
Q. Can you tell us whether or not it was dark at five o'clock in the morning at that time?
A. I can.
Q. Would that be absolutely dark?
A. Yes.
Q. Will you tell us whether it was a clear day or cloudy day at five o'clock in the morning on that day?
A. It was cloudy with a light fog and beginning to rain at 5:15 and raining all day.

(No cross-examination.)

[fol. 127] DONALD REDMAN, resumed the stand:

Cross-examination.

By Mr. Crawford (continued):

Q. Mr. Redman, you place the location of this wound somewhere above your shoe top; will you tell me how far that was above your toe top?
A. Right here (indicating).
Q. How far is that; half an inch?

A. From the shoe?
Q. Yes.
A. About that—right here (indicating).

Mr. Graves: I think he was touching his shoe.

A. (Continuing:) That is where it was, right there (indicating). It started from this direction and go right around.
Q. The cut?
A. No, the color of the foot——
Q. I am talking about this cut?
A. That cut made a kind of blister.
Q. Where did this cut go on your foot; you pointed to that; which way did it go?
A. This way (indicating).
Q. Pointing on the inside of your foot?
A. Inside of the skin.
Q. Pointing to the inside of your ankle?
A. Just the skin of the foot.
Q. This cut was an inch and a half long this morning?
A. No, not an inch and a half long.
Q. How long was it?
A. Like this, just like that much, that way (indicating).
Q. Straight across your foot?
A. Straight across—it was right across.

Mr. Crawford: Again indicating an inch and a half, your Honor.

The Court: About an inch and a half.

[fol. 128] Q. Was it worse at one end than the other, this cut?
A. The scar was not worse. Actually the foot kept swelling after that.
Q. It didn't swell up the same day?
A. No.
Q. I am talking about the same day you were hurt; was it worse at one end than the other or was it all bad?
A. It looked the same.
Q. Was it bad at one end or the other or was the whole cut deep?
A. It was not deep; it was a slant; ran right into the flesh.

The Court: Looked like a scratch?
The Witness: Yes, similar to that.

Q. Did this scratch bleed the inch and a half?

A. Yes.

Q. All along its whole length?

A. Yes, blood was on it.

Q. Now, the night watchman called you at about a quarter to five?

A. Quarter to five.

Q. Where was he when you went on deck?

A. I didn't see the night watchman; I don't know where he went.

Q. Didn't see him again?

A. I saw him around six-thirty.

Q. Now, will you tell us again exactly how this accident happened to you as you were walking forward toward this ladder?

A. Well, coming out from the well-deck, from the quarters, I was coming up on the well-deck to go up the ladder. It was dark. You couldn't see very well, and in trying to make the ladder I stumbled on again, I couldn't see, there was no light, and after I tumbled the ladder where you grab the rail to go up, I made a grab of the rail and this left went right into these slats and I felt a sharp piercing at the time and I held on to the ladder and held my foot [fol. 129] out and after I pulled the foot out I felt down and felt this loose slab. I couldn't see very well but I felt it, and a sharp nail was at the end of it. I took it just like that and threw it on the side of the ship and went on upstairs in the kitchen where it was light.

By the Court:

Q. Did you fall before you felt the slab?

A. No, sir, in trying to step on the ladder I stumbled right over these slats and I saved myself by holding on to the ladder or I would have gone into the whole bunch of nails. I grabbed the ladder and this foot went out like that (indicating).

By Mr. Crawford:

Q. After this happened were you still holding on to the ladder when you felt down on the deck for this slab, as you call it?

A. No, I took the slab out.

Q. What do you mean by taking the slab out?

A. Took the slab from the ground and threw it to the side of the ship.

Q. You saw the slab on the deck and you stooped and picked it up and threw it away?

A. Threw it away.

Q. And the slab was lying loose there, wasn't it?

A. Loose.

Q. Was not attached to any box?

A. No.

Q. Was there any box near it?

A. Yes, there were more slabs than that, about three whole boxes.

Q. How far away were they?

A. Near the hatch.

Q. You weren't near the hatch; you were over near the [fol. 130] ladder.

A. These boxes were over near the hatch.

Q. Just this one slab was near the ladder?

A. No, there was about two broken boxes near the ladder, all broken up.

Q. You could see this all at that time?

A. Couldn't see them then. After I went up in the kitchen and took my shoe off, where it was light, took the sock off and examined it and at six o'clock I came down and saw all these boxes there.

By the Court:

Q. About how far was it from the hatch to the rail?

A. From the hatch to the rail maybe two feet or more than that.

Q. Very narrow space?

A. Narrow space.

Q. How much room between the hatch and the rail?

A. That I couldn't guess because the ship is a small ship.

Q. What is her beam, do you know?

A. I don't know. The tonnage of the ship is not more than three thousand some hundred.

Q. What was the distance between the ladder and the rail?

A. That I don't know.

Q. Was that more than two or three feet?

A. More than one foot—two feet or two and a half.

By Mr. Crawford:

Q. And the ladder is about three feet wide?
A. Yes.
Q. How was it from the ladder to the hatch?
A. Two and a half or three feet; I am not sure.
Q. That makes a total distance of about seven to eight feet between the hatch and the rail, doesn't it, about as far as from me to you, on every ship you ever saw?
[fol. 131] A. I don't have the measurements exact.
Q. We don't want this exact.

The Court: You say you walked in the middle of the passage; we do not know how wide that passage was or how much room the slabs or broken crates may have taken up. What was t*eh* distance between the hatch and the rail? Did you have plenty of room to walk in?

The Witness: Yes, there was plenty of room about that way.

By the Court:

Q. Is that all the room you had to walk in?
A. Between the ladder and the hatch?
Q. How far was it from the ladder to the rail?
A. Maybe two feet; I cannot tell you.
Q. When you walked down the deck could you stretch from the superstructure to the rail?
A. No, sir, this ladder is in the center of the ship, the center of the walk-away. It don't connect with the rail. This ladder is this way and when you come this way you have to—(indicating).
Q. Do you have to make a turn when you go upon the ladder?
A. No, sir, if you go on the ladder you could not touch the hatch.

By Mr. Crawford:

Q. Then it is further than that, between the ladder and the rail?
A. The ladder is in the center of the walk-away.
Q. It is probably from where I can stretch my hands, isn't it?
A. I guess it is.

[fol. 132] Q. Did you ever see a cargo ship in your life where the hatch was nearer to the rail than I am to you?

A. Yes—no. From the rail the hatch is about the end of that table there.

Q. At least that far always?

A. But this is a small ship, very small ship. I don't know what is the tonnage.

Q. Now do you remember talking to Mr. Suessmuth in his office about this case in March, 1931?

A. Yes.

Q. And you told him all you knew about the case at that time, didn't you?

A. I told him the same thing I told the Judge here.

Q. You told him all you knew about the case, you had it written down, didn't you, written down on a piece of paper?

A. Yes.

Q. And he showed you the piece of paper after he wrote it down?

A. He didn't show it to me. He took the statement and said "Sign it", and that was all.

Q. Did you sign it?

A. Yes.

Q. Did you read it?

A. I didn't read it.

Q. You can read, can't you?

A. I could read, but he said, "Sign it, and I will take it up to the company's office and give you a reply in a few days." That is all there was to it.

Q. You mean to say you signed your name to a paper without reading what was in that paper?

A. I didn't read it because I know I told the truth.

Q. You weren't interested in seeing what they had written down on that paper?

A. No, I didn't read it. He asked me "Whom did you report it to", "the mate or the steward", and I said "the steward". He said, "All right, sign it here and I will take it up with the company."

[fol. 133] Q. You have been to school?

A. Yes, but I didn't have much learning.

Q. You went to school in the West Indies?

A. Yes, sir.

Q. Can you read and write?

A. Yes, I can read and write a little, but I haven't much education.

Q. You wrote that letter?

A. Yes, I wrote that.

Q. And yet you say you signed the paper without looking to see what was in it?

A. Yes, I don't know; I just told him how the accident happened, and I went to the Bull Line after I came out and they said——

Q. I didn't ask you that; just answer my question. I show you this paper and ask you if that is your signature appearing on the bottom of each page?

A. Yes, that is my signature.

Q. Is that the paper you were just talking about?

A. Yes, that is my signature.

Q. Is that the paper you were just talking about?

The Court: Is that the paper you signed when you were with Mr. Suessmuth?

The Witness: I don't know if this is the one I signed.

Q. Look at the second page, too?

A. The second page?

By the Court:

Q. Is that your signature?

A. Yes.

Q. Did you put that down the same day?

A. Yes, I am pretty sure the same day, yes.

Mr. Crawford: I offer this paper in evidence.

[fol. 134] (Marked Defendant's Exhibit B and read to the jury.)

Q. Now, do you recall signing any other papers when you were in the office of Mr. Suessmuth on March 5, 1931?

A. No, no mark in that paper.

Q. I show you this paper and ask you if that is your signature appearing on the bottom of each page?

A. Yes, that is my signature.

Q. Look at each page; see if it is your signature on each page?

A. Yes, that is my signature.

Q. Do you remember that paper being shown you?

A. I don't know, no more than that paper there, two sheets of paper. I gave him the statement.

Q. You gave him the statement and it was written down?

A. Yes; he had it typed and I signed it, and he said, "I will take it up."

Q. You just heard me read the paper to the jury?

A. Yes, some of it is there. I didn't tell him I was carrying stores; I was going right along in the kitchen.

Q. Anything else wrong in that statement?

A. About the boxes, he didn't put it in there.

Q. Do you want to state you told this man Suessmuth about the boxes?

A. Yes, sir. He asked me, "Before that accident did you have any bruises on your foot?"

Mr. Crawford: I offer this paper in evidence.

(Marked Defendant's Exhibit C—three pages.)

Mr. Crawford: I am not going to read this at the present [fol. 135] time because it is practically a repetition of the other statement. It will be available and you gentlemen can look at it if you care to.

Mr. Graves: Do you want to read it?

Mr. Crawford: It is repetitious.

Mr. Graves: If it is worth putting in it is worth being read.

Mr. Crawford: It is practically the same statement.

Mr. Graves: You offered it in evidence.

Mr. Crawford: Yes, sir.

The Court: You showed it to Mr. Graves.

Mr. Crawford: Yes, sir.

The Court: What does he want you to do, stop your reading?

Mr. Crawford: No, I said I am not going to read it because it is repetitious.

The Court: You can read it, but you cannot say it is almost the same. That is your conclusion.

Mr. Crawford: I will read it very rapidly.

Mr. Graves: May I have each page marked?

Mr. Crawford: Certainly.

(Pages 1, 2 and 3 of Exhibit C separately marked.)

Q. Mr. Redman, do you remember swearing to these two statements, Defendant's Exhibits B and C before a notary public?

A. I only remember one time, two sheets of paper, that is all.

Q. Is that Defendant's Exhibit B which the Judge now has and did the notary public say to you, "Do you swear to this," and you said yes?

[fol. 136] A. What I told the Judge now is what I told Mr. Suessmuth.

Q. The notary was asking you about this paper he held in his hand?

A. Yes.

Q. And you said that was true?

A. The statement I gave him, that was true.

Q. You didn't give the statement of the injury?

A. Mr. Suessmuth——

Q. And now the notary comes in and he says, "Do you swear to this," holding up the paper that you signed?

A. Yes, that is true.

Q. And you said "yes" without reading the paper at all?

A. I didn't read it because I told the truth.

Q. Do you know a man named Rotella, in Brooklyn?

A. No, sir; I am a stranger in Brooklyn. I never lived in Brooklyn until this accident.

Q. Do you know the Hamilton Avenue Hotel?

A. Yes.

Q. Been there for some time?

A. I went from the hospital there.

Q. You never saw a man named Rotella there?

A. No.

Q. Is Mr. Rotella in court?

A. Oh, I know him as Dominick.

Q. You know this man well?

A. Yes, Dominick, I call him.

Q. Did you ever discuss your case with him?

A. Nothing about the case.

Q. Ever memember telling him you didn't know what was wrong with your leg?

A. I tell him that?

Q. Did you ever tell him that?

A. No, sir, never had no talks with that man.

Q. Never talked to him at all?

A. No, nothing about the case.

[fol. 137] Q. All you know is his first name?

A. That is all; I came back from the hospital and roomed there.

Q. How long did you room there when you came back?

A. I don't know how long, but I stayed there quite a while, until the summer came.

Q. Stayed six months?

A. I went away in March or April sometime; I can't remember.

Redirect examination.

By Mr. Graves:

Q. What was the condition of your health prior to February 13, 1930, your general condition, so far as you know?

A. It was good.

Q. Had you been working right along?

A. Right along, yes, sir.

Q. Did you have any aches or pains prior to that day in either of your legs?

A. No, sir.

Q. Or in any part of your body?

A. No, sir.

Q. Have you ever had an accident in either of your legs before?

A. No, sir.

Q. Have you had any other since you left the hospital, any other accident?

A. No.

Q. Now, this examination that took place on board the ship on the morning of the 14th when the doctor came aboard and you said you went up there, what was the nature of that examination?

The Court: What did they do; did they strip you?

The Witness: No, sir, they just take away part of your pants for what you call a venereal disease. The examination was for venereal disease.

Q. What about it?

A. That is what everybody was examined on the ship for.

[... 138] Q. How did they examine for that; why did they examine for that?

A. Because we was going to a foreign port. The ship was bound for a foreign port, Porto Rico and San Domingo.

Q. Tell us what they do—we don't know—do they examine your organs?

A. Examine your eyes and different places.
Q. Do you have to strip?
A. No, sir, just part of your clothes.
Q. Examine your chest?
A. Yes.
Q. Then do they examine some of the other organs?
A. No; you go in a private room and the doctor says, "All right; take part of your clothes off," and he looks at you.
Q. What part of your clothes did you take off?
A. Didn't take off nothing; opened my pants.

By Mr. Graves:

Q. You just opened your pants and he looked at you and you walked out, is that it?
A. Yes.
Q. He didn't take any Wassermanns?
A. No, sir.
Q. While that vessel was at Pier 27, February, 1930, what day did the stores come aboard?
A. The stores came aboard the 14th day of the month.
Q. What did they do on the night of the 12th?
A. Coming in here from Alexandria it is always the rule of the ship to clean the icebox up and get ready for Saturday, to receive fresh stores.
Q. What do they do when they clean up the icebox?

Mr. Crawford: I object as incompetent, irrelevant and immaterial.

[fol. 139] Q. Were you there; did you see it done, see them clean out the ice box?
A. Yes.
Q. To get ready for stores the next day?
A. Yes.

Mr. Crawford: I object to further leading.

Q. And you say the stores came aboard on the 14th?

Mr. Crawford: I object to the question as leading.

A. Yes.
Q. Did you yourself handle the stores at all?
A. No, I was in the kitchen.

Q. Did you on that boat have anything to do with the stores?

A. Not on this ship. I always worked in the kitchen and the mess boys do the handling.

By the Court:

Q. This statement over your signature, "At this time I was assisting in carrying stores on board." Is that true?

A. No, sir; I was cooking, I was in the kitchen alone, cooking.

Q. You say, "I was assisting in this way from about one P. M. until about three P. M. While so engaged by left foot began to pain me. The stores were put in various stores." Is that statement true?

A. That statement is not true.

Q. Did you ever make that statement to Mr. Suessmuth?

A. I did not. I told him——

Q. Never mind that; you never told him that?

A. No, sir.

[fol. 140] Q. That is not true?

A. That is not true. I was working in the kitchen and the steward and mess boys were handling the stores.

By Mr. Graves:

Q. You purchased some liniment at that drug store on the night of the 14th of February?

A. Yes, sir, and the steward was present.

Q. What kind of liniment did you purchase?

A. Sloan's Liniment.

Q. Who advised you to get that?

A. He advised me it was good.

Q. Who told you to go to the hospital; how did you get to the Cumberland Hospital?

A. After I saw the foot swelling and I felt so bad I told the man to get the policeman on the beat and let me go to the hospital.

Q. How did you go to the hospital?

A. The ambulance came and got me, Cumberland Hospital.

By the Court:

Q. When you were on board ship did you have more than one suit of clothes?

A. Yes, sir.

Q. Did you have on the ship everything that belonged to you?

A. No, sir; some clothes were left on the ship.

Q. All the clothes you had anywhere, did you carry them on the ship with you?

A. No, sir, I left some of my clothes in Baltimore, where I joined the ship.

Q. How much more clothes did you have?

A. Suit of serge, working shirts and overcoat. Only one suit I took with me, and an extra pair of pants.

[fol. 141] Q. Before you left the ship did you take those away?

A. No, sir.

Q. None of them?

A. I didn't take away nothing.

Q. Is this statement true: "I told Ramsey, the steward, I would not make the trip as my foot was badly swollen. I packed my clothes and left the vessel. I went to 32 Hamilton Avenue, Brooklyn, where I stayed until February 20." Is that statement true?

A. No, sir; I did not take my clothes.

Q. When you went to the hospital what did you have with you?

A. A suit of clothes; that is all.

Q. You had no extra shirt?

A. Nothing.

Q. Extra socks?

A. No, sir, overcoat, suit, shoes and hat; that is all.

Q. In whose handwriting is this Defendant's Exhibit C?

A. I don't know who wrote it.

Q. Was that written in your presence?

A. All I know is two sheets were written. He said, "All right, sign here, and I will take it up with the company."

Q. The signatures are yours?

A. I acknowledge the signatures but I don't know about the writing.

Q. You signed it?

A. I signed it. I don't know how they get those two there. All I can remember is I signed two.

Q. But you put your signature there?

A. He said, "Sign here." I didn't think nothing. I never had no injury. I didn't know nothing about this business. I might have signed something that was against

me. I did think I would call the company up to see if they would do something for me. I wouldn't have to go to him.

[fol. 142] By Mr. Graves:

Q. About clothes; did you leave part of your clothes on the ship?

A. Yes, sir.

Q. You had intended coming back?

A. Yes, sir.

Q. And everything you had on the ship was still there?

A. Yes, sir.

By the Court:

Q. You never got them back?

A. No, sir.

Q. Did you ask for them?

A. Yes, sir. After I came from the hospital and I was notified that the port captain had them. It was a year later.

Recross-examination.

By Mr. Crawford:

Q. You say you never went back for them after you got out of the hospital because it was a year later?

A. I went back for them. He said I think the port captain has left here and took charge of some house.

Q. You didn't go to see the port captain, did you?

A. No, I didn't.

Q. You said it was cold in your quarters on the ship?

A. It was cold.

Q. Where did you feel this cold, in your foot?

A. Not in the foot alone. You could hardly sleep.

Q. You did feel cold in your foot?

A. Yes, after the foot began to swell up and discolor.

Q. How many nights did you sleep on the ship when the foot began to swell up and discolor?

A. From the time the ship entered there until the night of the 14th. The accident happened on the 13th.

[fol. 143] Q. You never slept on the ship when your foot was swollen, and discolored, did you?

A. The 13th the injury to the foot didn't show like that.

Q. You do know when your foot was swollen and discolored that you slept on the ship?

A. No.

Q. But before that time you did feel cold in your feet and particularly your left foot?

A. In the left foot.

Q. In this statement, Defendant's Exhibit B, you mentioned feeling a pain in your foot on the 12th day of February, is that what you told the man?

A. No; the 13th.

Q. I call your attention to one of the statements in Defendant's Exhibit B on the second page: "Previous to February 12, 1930, I never had any trouble with my feet, particularly the left. It was on this date that the left foot began to pain me in my ankle and then went to my toes."

A. The 13th is the one I told him.

Q. Is this statement true?

A. No, it is not.

Q. Did you tell Mr. Sucssmuth on the 5th day of March, 1931, that it was the 12th this began to hurt you?

A. No; the 13th.

Q. You told him the 13th and he wrote down the 12th?

A. It must be right; I know I told him the 13th.

Q. Now you looked at this foot of yours every day from the day you left the ship until you went to the hospital, I suppose?

A. Yes.

Q. When did anything begin to be wrong with your toes, what day?

A. The ship sailed the 15th and I used this liniment right away. Around Wednesday the toes began to discolor a little and I got kind of scared myself and that is why I figured I am going to the hospital right away.

Q. But you didn't go to the hospital, did you?

A. No, I didn't go until Friday. I saw there was no [fol. 144] use. I had no slip for the Marine Hospital, and I had no friends around Brooklyn, and I didn't know what to do, and a friend——

Q. I asked you about your toes; it was Wednesday when you first noticed your toes began to get discolored?

A. Yes.

Q. That was the first time you told us about the foot—was the instep bad or just the toes?

A. Where the cut was it was swollen and discolored.

Q. Did it look worse or better than it started to look on the 13th and 14th?

A. On the 14th it started to get worse.

Q. On Wednesday did this cut look better or worse?

A. Worse.

Q. Did it look sore?

A. Oh, yes.

Q. Did it look red?

A. Red.

Q. Did it look like a deep wound?

A. It had discolored. It was not a deep wound; it was swollen and red, that is all.

Q. At this one spot?

A. One spot.

Q. Then later it went down to your toes?

A. Yes.

Q. Was there anything between your toes and this place on the instep that went bad?

A. Yes.

Q. It looked all right in there?

A. Yes.

Q. And it looked all right until you went to the hospital; it was after that that your foot became bad?

A. After I went to the hospital it got worse.

Dr. Marcus Newstadter, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Graves:

Q. Doctor, are you a licensed physician and surgeon?

A. I am.

[fol. 145] Q. How long have you been practicing?

A. Going on 38 years.

Q. Where did you acquire your training?

A. In 1896 I graduated at medicine, Bellevue Hospital Medical College. In 1906 I received the degree of Doctor of Philosophy in New York University. Then I was in Berlin and Paris on my post graduate work in nervous and mental diseases.

Q. Have you been practicing ever since?

A. Yes, sir. At present director and chief visiting neurologist at the Neurological Hospital, on Welfare Island.

Q. Did you examine Donald Redman, the plaintiff in this case at my request?

A. I did.

Q. Do you remember the date of the examination?

A. May I be permitted to consult my record?

Q. Yes.

A. I have examined him on the 30th and 31st of January, of this year.

Q. Will you tell the Court and jury the extent of your examination and your findings?

The Court: Was this a general physical examination?

The Witness: Yes, general physical examination.

A. The blood pressure was 140 over 110; pulse 114. He had Argyll Robertson pupils. This is a pupil defined in several diseases but particularly very often in syphilitic conditions. It is a pupil which does not respond to light. With a flashlight uniformly the pupil contracts. When you bring an object near the pupil it also contracts. His pupil is one that does not respond to light but does respond to near vision. The crowns were normal. Looking back [fol. 146] into the eye, in the retina there was nothing wrong found. All reflexes were present, none absent and none were abnormal. His liver was of normal contour. His heart was of normal contour and normal condition. The left leg was amputated leaving about four inches below the knee adjudging from measurements of both legs there was 17 inches gone. Wasserman was reported 4 plus; otherwise I found nothing abnormal.

Q. Now, doctor, assuming that this man on or about February 13th, 1930, was a cook on board a vessel here at the port of New York; assuming that on that day he was approximately 38 years of age; assuming that prior to that time he had been in good bodily health except for a fever he had in 1910; assuming he had had no previous accident to any of his limbs and assuming that on the day in question he was able to do his work and that prior to that time and on that date he had no aches or pains or complaints or any disease he knew about except that subsequently a Wassermann test revealed a 4 plus reaction, and assuming that on

the day in question he walked across the deck and stumbled over some boxes which contained some broken slats and that a nail punctured his left foot, he having low shoes on at the time and that the puncture was at the top of the instep near the middle section there and that a scratch about an inch and a half long was made on his foot through the sock; and assuming he immediately went to the kitchen and took off his sock and blood was exuding from this scratch or lacerration, and assuming thereafter he washed the wound, put on the same sock again which was bloody and went about his work until later in the day when he rewashed it and put on fresh socks, and assuming he did not [fol. 147] notice anything wrong that day with the scratch or wound and assuming when he woke up the next day, the 14th of February, he noticed a faint discoloration there and that later in the day the foot began to discolor more and swell slightly, and assuming that in the evening of that day the swelling became more pronounced, that during the 14th he had slight pain and that during the day the pains increased, and assuming that he went ashore that evening, slept ashore and applied Sloans liniment to this scratch, and remained ashore six days and the foot became more swollen and assuming that on the 19th the toes became discolored and on the 21st he was taken to the hospital, and on the day following he was found to be suffering with gangrene of the left foot, and assuming that on the 24th day of February, 1930, a competent physician at the hospital performed the operation of periarterial sympathectomy in the left femoral artery, and assuming that the operation was properly performed and that at the same time the surgeon ligated the femoral vein and assuming that after he remained in the hospital, his condition not improving much until April 17th, at which time the gangrene had not improved and it was necessary to amputate his leg and his leg was amputated, and assuming that he was ashore, that is, going back before he was taken to the hospital, that he had great fever, intense pain and swelling in the foot, and assuming that he has never had another accident since, can you say with reasonable certainty, as a physician, whether or not the accident described on board the vessel in question could be, in your opinion, as a physician, a competent producing cause of the gangrene which existed?

[fol. 148] Mr. Crawford: I object to the question on the ground there is no competent medical testimony that this man had a high fever at any time and went to the hospital. I further object on the ground the type of gangrene is not specified in the question,

By the Court:

Q. From the facts you have assumed, are they sufficient to enable you to answer the question with reasonable certainty?

A. Yes, sir.

Q. You have enough facts to enable you to stake your reputation on and give a reasonable opinion?

A. Yes, sir.

By Mr. Graves:

Q. Will you state the accident so described was the competent producing cause of the amputation of this leg?

A. It was.

Mr. Crawford: I object to the question; that is for the jury to decide. He asked the question in the most unorthodox form I have heard since I am in court. He has asked the witness whether the accident he described was the competent producing cause of the injury.

Q. It could be, could it, Doctor?

A. It could be.

By the Court:

Q. The question is not what it could be; your answer was it could be.

A. My answer was before it was.

Q. What do you mean by saying now whether it could be?

A. Mr. Graves asked me whether it could be.

[fol. 149] Mr. Graves: It was both?

The Witness: It could be and was.

Q. Doctor, did you examine his blood?

A. No, sir.

Q. Made no blood test?

A. No, it was reported 4 plus and the pupil was sufficient indication to me that he had syphilis. No doubt about it.

Q. Is it the reaction of pupils to light?

A. The approach of an object.

Q. Is that present in syphilis?

A. No, it is present in other symptoms, but we have other conditions.

Q. What?

A. In sleeping sickness we have found that and in acute alcoholism we have found that sympton.

Q. Was he suffering from alcoholism?

A. No, not when he came to me. Also in some forms of insanity we have got that and also in cases of brain tumors. He had nothing of that when I saw him.

Q. Did you examine his arteries?

A. Oh, yes.

Q. You didn't tell us that.

A. I said the blood pressure was 140 over 110. I said that the eye crowns were normal and the heart was normal.

Q. Would you say that those things are normal and present after arteriosclerosis?

A. Not at that age. You have that over fifty-five.

Q. Don't people have it——

A. We have what we recognize as the cycle arc around the pupil.

Q. Can you speak with reasonable certainty as to whether or not when you examined him he had syphilis or not?

A. Yes, sir.

Q. Now, doctor, assuming all that you have told, assuming also that a blood test was taken and that that blood test was 4 plus, Wassermann test, would you change your opinion then?

[fol. 150] A. I would not. On the contrary it would strengthen my opinion that he had syphilis.

Q. In other words a 4 plus Wassermann test is not an indication of syphilis?

A. It is the only indication.

Q. Supposing you had been asked to assume also that his blood was tested and that his blood showed 4 plus, would you say he had syphilis?

A. I would say he had syphilis.

Q. And would you say if the blood showed 4 plus that with reasonable certainty you would say he had syphilis?

A. Yes, sir.

Q. You say when you examined him, did you say you believed he did not have syphilis?

A. I said he did.

Q. Did you know enough facts to determine that he was syphilitic?

A. The Argyll Robertson pupil shows even though his blood Wassermann was negative—a negative Wassermann means nothing; a positive Wasserman means something.

Q. Did you make sufficient tests to speak with reasonable certainty today as to whether or not he was syphilitic?

A. I did.

Q. Before you could render an opinion with reasonable certainty as to any of your patients, whether the men were syphilitic or not, would you require a Wassermann test?

A. I would.

Q. Without that would you express an opinion as to whether he was syphilitic?

A. Yes, I would. In positive cases, for instance, in locomotor ataxia, which we know today is 100 per cent. syphilis and nothing else. We have 20 per cent——

Q. Can you determine syphilis without the test?

A. Absolutely. In other words, if his Wassermann was negative, with his Argyll Robertson pupils, with the inflammatory condition, I would put him down as syphilitic. [fol. 151] If he had a positive Wassermann with an Argyll Robertson pupil there is no question about it. The Wassermann is only confirmatory.

Q. Is a Wassermann test the best test known to determine whether a man had syphilis or not?

A. It is, but we determined whether a man was syphilitic for two hundred years before this man was born. A man can have syphilis of the blood vessels, syphilis of the brain, syphilis of the muscles, syphilis of any part of the body.

Q. Assuming I came to you and wanted a general examination would you give me the Wassermann test?

A. If there is no indication and no history and the patient denies having had an infection, and 85 per cent deny it, if there are no symptoms, why the Wassermann?

Q. Suppose a man came to you and wanted a general examination and he denied to you he ever had a venereal disease and you as a doctor being asked to stake your reputation on your opinion, would you give him a Wassermann test?

A. It is my practice and the rule is every patient that comes in is guilty until proven innocent and I have 475 beds.

Q. Did you know that Donald Redman had gangrene?

A. He told me that when he came.

Q. Would that lead you to ask for a Wassermann test?

A. Yes.

Q. But you didn't ask him?

A. I was told that he had 4 plus.

Q. And still you would say he was not syphilitic?

A. I would say he is.

Q. Then you would say he was syphilitic?

A. I would say he was syphilitic, and it was on the basis of syphilis that he contracted gangrene.

Q. He was syphilitic?

A. Yes.

Q. I thought you said you found nothing abnormal?

[fol. 152] A. Physically. Outside of the Argyll Robertson pupils I found nothing abnormal. Physically, so far as my test goes, of his liver, spleen and central nervous system.

Q. Your opinion is that he was syphilitic?

A. Yes.

Cross-examination.

By Mr. Crawford:

Q. What kind of work are you doing now?

A. Neurology and psychiatry.

Q. Don't come across any cases of gangrene, do you?

A. I certainly do. In my book on Clinical Neurology I speak of symmetrical gangrene.

Q. Do you come across very many cases of gangrene?

A. No, not very many.

Q. What is the last one that you treated, Doctor?

A. I don't treat cases, I am only a consulting physician.

Q. Doctor, how many years have you been a consulting physician?

A. For the last twenty-five years.

Q. And during that period you have not treated any cases of gangrene?

A. I have seen cases of gangrene.

Q. You have not treated any?

A. I have not treated any.

Q. See them once?

A. Seen them once, give them my opinion and tell them what to do.

By the Court:

Q. Are there all kinds of gangrene?

A. There is moist gangrene and dry gangrene.

Q. Is it a different thing, gangrene caused by external infection from internal physical condition?

[fol. 153] A. An external infection directly never causes gangrene but indirectly it may have some relation to it, that is, producing alteration in the vascular system. Gangrene means death of tissue. The only way they can have gangrene is if the circulation of that part is stopped and there is no food brought to the tissues nor the adulterous matter carried away from the tissues. Then it dies and you say it is gangrene.

Q. And gangrene is never caused directly by infection?

A. An infection outside does not cause gangrene unless there is a mechanical pressure exerted outside on a sufficient amount of blood vessels where the entire circulation is stopped, just as much as when you take a pinch and stop circulation physically, but there must be a sufficient distraction of blood vessels so that if no circulation comes to that part, the part dies.

Q. Would you say that such a gangrene condition which leads to the amputation of a leg was approximately caused by syphilis?

A. When we speak of syphilis it is a very particular term. As I told you before, we can have syphilis of any part of the body. Now what we mean by syphilis is we have discovered lately since the Wassermann reaction came out what is known as sphaero-bacteria. This germ is a long elongated corkscrew-like germ and related to what we call trypanosomes, that are alike to sleeping sickness, malaria and so forth. Now this germ can locate itself in any part of the body. As matter of fact, some author told that the germ is not a uniform species, that some of these germs have an affinity for the skin so that a man will get skin syphilis. Some of these germs have an affinity for the brain so that they have syphilis of the brain and some have [fol. 154] an affinity to blood vessels and they get syphilis

of the blood vessels. This germs locates itself and does become in the majority of cases what we call latent. A man may live a hundred years and not know it. We discover it on the autopsy table quite often. On the other hand, an injury to a particular part which happens to be infected by these germs or an inflammatory condition, or an infection, might reduce the resistance of the body to that latent or sleeping germ and will actuate and produce an awakening of it with all its manifestations. That is what happened in this case. That man has——

Mr. Crawford: I object.

Q. You say when syphilis is present in the forms you describe is it indicated by the Wassermann test?

A. If it is passive we may still have no symptoms. We may not have an Argyli Robertson. We have other tests to corroborate that now, the Kahn test.

Q. Did you tell him he had syphilis?

A. I told him nothing. I examined him and told him to go home and I would report to Mr. Graves my findings.

Q. Did you report to Mr. Graves he had syphilis?

A. I did.

By Mr. Crawford:

Q. Getting back to your practice, Doctor, when is the last case of gangrene that you have seen?

A. Several years ago; I couldn't tell exactly.

Q. About how many?

A. Four or five, as far as I remember now.

Q. What kind of a case was that, dry, moist?

[fol. 155] A. It was dry gangrene, symmetrical gangrene, in a case of diabetes, and that was a man of sixty-five with arteriosclerosis.

Q. I don't care about that, I want to know whether in this case the gangrene was brought on by any wound?

A. No, sir, it was a case of arteriosclerosis and came on spontaneously.

Q. And any case of arteriosclerosis can bring on gangrene without any blow, trauma, or wound?

A. Yes, sir.

Q. Isn't dry gangrene caused by a wound infection and isn't there a gangrene caused by sclerosis?

A. Of course.

The Court: Any difference?

The Witness: It is different, but it is the same result in both cases.

Q. Is is a death of tissue in both cases?

A. Yes.

Q. But they don't look alike?

A. Yes, you can have dry gangrene and you can have moist gangrene. It depends on which part is affected. They thought——

Q. You don't know what they thought?

A. I do, from the nature of the examination. If a man makes a——

Q. Don't tell us what these doctors think, because we are not interested in it. We know what they state here in court. You have said that a gangrene caused by a wound is different from gangrene caused by arterial trouble, it is a different type of gangrene?

A. I didn't say that. I said the idiological factor is different.

Q. Isn't gangrene caused by infection from a wound known as gaseous gangrene?

[fol. 156] A. Yes, it is, but if you will let me talk—the cause—infection—does not produce gangrene.

Q. I don't care about that.

A. I am interested to tell the truth.

Q. I want you to tell the truth in answer to my questions and not make speeches.

A. You cannot always answer questions unqualifiedly. I must qualify sometimes.

Q. (Repeated.) Isn't gangrene caused by infection from a wound known as gaseous gangrene?

A. Yes, sir.

Q. And that has a very definite set of symptoms, hasn't it?

A. The same thing as the arterial.

Q. Isn't there always pus connected with gaseous gangrene?

A. Of course.

Q. There always is pus?

A. Yes.

Q. And this swelling?

A. Yes.

Q. And it is a moist gangrene?

A. Yes.

Q. In all cases?

A. Yes.

Q. Then if you knew this particular case was a case of dry gangrene you would say it could not be caused by an infection, isn't that so?

A. Oh, no. Every infection is not gas bacillus. We have infections of any number of kinds. We can have a streptococcus infection. We can have any other bacillus infection. In every infection is gas, thank God.

Q. I asked you if gangrene caused by a wound infection was always gas gangrene?

A. You didn't ask that, and it was not.

Q. What other type of gangrene can be caused by infection from a wound?

A. No other kind.

Q. No other kind but gaseous?

A. A direct wound giving gangrene will give a moist gangrene irrespective of what the nature of the infection is if it is with pus.

[fol. 157] Q. Always?

A. Not always. I just told you I have seen a case of gas infection and no gangrene.

Q. I am only interested in gangrene cases. You can confine yourself to that very definitely. You have never seen a case of gangrene caused by wound infection that was not moist gangrene, is that right?

A. No, I wouldn't say that, I wouldn't make that statement.

Q. You did just a minute ago?

A. I did not.

Q. Just a minute ago you stated that gangrene caused by infection from a wound was always moist?

A. I didn't say that.

Q. That is what I referred to?

A. In gas bacillus infection.

Q. Now, I am asking you to state whether or not gangrene caused by infection from a wound is or is not always a moist gangrene?

A. Not necessarily.

Q. [illegible] it always a gaseous gangrene?

A. Gaseous gangrene is a different bacillus and we have a hundred and fifty varieties.

Q. Did you go to war?

A. No, sir; I was too old, they wouldn't take me, but I have done service in this country.

Q. Don't you know that gangrene caused by wounds in war are known commonly in your profession as gaseous gangrene?

A. Whenever there are gas bacilli.

Q. Whenever it was a case of gangrene resulting from a wound?

A. Not necessarily; not always.

Q. This last case of gangrene you did some four or five years ago?

A. Yes.

Q. A dry case?

A. Yes.

Q. When was the last case before that that you saw?

[fol. 158] A. I don't remember. I don't remember when I saw certain cases, I see so many.

Q. You apparently saw so few cases of gangrene that you don't remember?

A. I saw very few cases, comparatively speaking, of gangrene.

Q. How many have you seen in the last twenty years?

A. I don't know.

Q. Will you swear you have seen five?

A. I have seen more than twenty-five.

Q. When was the last case you saw, what gangrene caused by pus infection?

A. I don't remember.

Q. Your best recollection?

A. I don't remember.

Q. It may have been ten years ago?

A. I don't remember.

Q. May have been fifteen years ago—do you know Dr. Da Costa, an authority on gangrene?

A. Dr. Da Costa is an authority on surgery.

Q. And as such he is familiar with gangrene?

A. He certainly is.

Q. Well recognized?

A. A very good man, one of the best men in the country we have.

Q. Do you agree with Dr. Da Costa when he says gangrene results from inflammation, strangulation and infection, because the tissues are filled with blood?

A. I agree to that, but there is something more than that. It depends on where. You don't let me talk. You have read statements. I must agree with the statements but I have got to qualify what he means.

Q. Qualify what you mean, but don't qualify what he means.

A. I will qualify what I mean if you will allow me. If you have a lesion very far away from the gangrenous spot, that is to say, if you have here (indicating) a blocking of blood vessels completely, no circulation, swelling, odema, [fol. 159] you will have wet gangrene, but if your gangrene begins at the bottom then you will have a slowly dying dry gangrene. The point is how far away from the gangrene the trouble is, how much tissue is involved, further away, how much blockage there is. In one case they had gangrene here (indicating), and operated here. They thought that was where the trouble was——

Mr. Crawford: I move to strike out what they thought.

Q. Doctor, do you perform this operation of sympathectomy in all cases?

A. I do not operate.

Q. Does your profession operate in all cases or certain cases only?

A. In certain cases where there is a contraction of the blood vessels and a lack of circulation, where we have reason to suspect that we cut away part of the outer coat of the blood vessel and thereby cure some cases of gangrene.

By the Court:

Q. Do you do that when you suspect?

A. We operate in a great many cases where we suspect. We don't know it all, your Honor.

Q. You don't perform this sympathectomy where you have gangrene caused by an open wound?

A. No, sir.

Q. Wouldn't do any good, would it?

A. No, sir.

Q. As a matter of fact it might do a lot of harm?

A. No, sir, it is a perfectly innocent thing. It helps to carry the blood down to this gangrenous spot. If you dilate the blood vessel you get a greater amount of blood stream into the tissues and it would not hurt.

[fol. 160] Q. Gets back into a man's system?

A. I don't know what you mean. You don't cut the blood vessel. You just take off the outer coat. You have three coats in a blood vessel. You have the outer coat, the muscular coat and the undulated coat. You have still two coats left.

Q. But it is supposed to stimulate the flow of blood, isn't it?

A. It doesn't stimulate, it simply cuts away these branches of the nerve that contract. You get a dilatation. If you get a dilatation you get a greater amount of flow of blood.

Q. That is what I said, it gets a better flow of blood, but you deny that?

A. I didn't deny anything.

Q. Do you agree with Dr. Da Costa when he says that in a drunkard or in a victim of syphilis or tubercular the changes that occur with old age may appear while a man is young in years?

A. Yes, all types of changes. He enumerates, doesn't he?

Q. "It was long ago said with truth a man is as old as his arteries."

A. That is true.

Q. "Senile gangrene occurs in a toe or foot. A man with senile syphilis can get gangrene before he is old"?

A. No, no, any more than a man that is an Italian gets French gangrene. It doesn't say that here. It says that in cases of syphilis of the arteries, as in this case one may get gangrene although young, because we have some changes very much like the old, with this exception, that in the old we have deposits of calcium, of lime, and that is why we call them hardened arteries. In the young we have it like in the senile, but we do not have the deposits of lime.

Q. I will now read the whole paragraph so you can see what Dr. Da Costa says: "Senile gangrene—chronic gangrene—Potts gangrene, which was first described by

[fol. 161] Percival Potts, is a form of gangrene due to feeble action of the heart plus arteriosclerosis of the vessels. There is a failure of nutrition of the vessel wall"——

A. Now you are coming to the point.

Q. "Proliferation cause thickening and sclerosis of the intima and media, and finally there is degeneration and calcareous deposits. The vessels do not carry a normal amount of blood and may at any time be occluded by thrombosis."

A. I agree with you.

Q. Wait a minute. "In a drunkard or in a victim of syphilis, Bright's disease, tuberculous or lead-poisoning, the arteriosclerotic condition supposed to grace old age may appear while a man is young in years."

A. That is just what I said.

Q. I wanted to read you the whole paragraph.

A. You have read enough.

Q. "In a drunkard or in a victim of syphilis, Bright's disease, tuberculous or lead-poisoning, the arteriosclerotic condition supposed to grace old age may appear while a man is young in years. It was long said with truth a man is as old as his arteries." I want to know if you agree with Dr. Da Costa in what he says in that paragraph?

A. I do.

Q. Now, Doctor, where you have a case of gangrene caused by infection from a wound is that gangrene more or less apt to spread than in a case of dry gangrene?

A. That depends on the etiology and depends on the mechanics of the gangrene.

Q. In a case of gangrene as a result of infection from a wound isn't it probable in most cases that you do amputate sooner or later?

A. It depends on the amount of gangrene because if it is simply insignificant and limited to a small part we might [fol. 162] have a demacation and sequestration of the part by itself, unless the gangrene progresses then amputation becomes imperative.

Q. You don't get that line of demarcation in moist gangrene as you do in dry gangrene, do you?

A. Yes.

Q. You most always get it in dry?

A. No.

Q. Isn't that Nature's attempt at amputation?

A. Yes, but nature does not do this work all the time.

Q. Isn't it rather rare in cases of moist gangrene that you get this line of demarcation?

A. Yes.

Q. And where gangrene has spread enough to cover a man's foot up to the high instep because of wound infection, you have a case for amputation there, haven't you, in most cases?

A. Yes.

Q. And amputation must take place soon in order to save the leg or possibly his other leg; isn't that so?

A. Yes.

Q. What are the symptoms around a wound that is causing, the look of a wound that is causing this gangrene?

A. Bluish discoloration and intense pain, and also coldness of the extremities.

Q. I am talking about the wound?

A. The wound itself shows a bluish discoloration and intense pain.

Q. That is a different color from the color of the surrounding gangrene?

A. The color of the surrounding part, the one that appears normal, is usually blended in to the normal color of the rest of the extremity. Is shows there is the beginning of a deficiency of circulation.

Q. And the place where the wound exists is easily distinguished from the body of the foot where the gangrene exists?

A. The place where the wound exists is easily distinguishable from the other part.

[fol. 163] Q. From the gangrenous part?

A. I don't understand your question.

(Adjourned to Friday, March 24, 1933, at 10:30 A. M.)

New York, March 24, 1933.

Trial Continued

Dr. Marcus Newstadter, resumed the stand:

Cross-examination.

By Mr. Crawford (continued):

Q. Doctor, just a few more questions.

The Witness: May it please your Honor, I would like to correct one statement yesterday with regard to how many cases, when I saw the last case of gangrene. I saw so many different types of cases and I had an unfortunate death in my family. Two years ago I saw a case of my own son-in-law. I called up the superintendent of the hospital and he called my attention to the fact that they have eight or ten cases of gangrene a year. Of course I did not see all the ten cases. I am called in where there are neurological symptoms, but I have seen so many cases, dozens of cases, that it is impossible for me to say whether I have seen five or ten or how many.

Q. You said yesterday you had not seen a case in five [fol. 164] years; do you remember that?

A. I had forgotten. I see them right along. I have 254 beds, my patients, and I am called from the other wards. When I went home I went through in my own mind, through the wards, and began to remind myself.

Q. But you don't pay much attention to the gangrene part of the case?

A. Unless it is a neurological case.

Q. In the case of gangrene caused by a wound infection, forgetting the gangrene for a minute, when you have gangrene of a wound you always have pus, don't you?

A. Not always. You take a small thing, everybody knows you get an infection, but you don't get pus.

Q. When you get an operation.

A. Take a case like syphilis, you don't have pus.

Q. I am talking about infection from a wound.

A. Not necessarily.

Q. But you have inflammation?

A. Always.

Q. What is that inflammation?

A. Inflammation is characterized by swelling, redness and heat and the inflammation pathologically means throwing out of an exudation from the blood which contains white blood cells which are the soldiers of definiteness in the body to destroy the germ?

Q. That is always present in an infection?

A. It is always present in an inflammation and infection.

Q. Has the lymph stream anything to do with that?

A. It is from the blood.

Q. And it is wet and the tissues are full of moisture?

A. It is full of moisture. Now, that exudation may contain pus, but don't have to have it always.

Q. So when you get a gangrene infection you have a wound infection?

A. Yes—not always.

Q. When you have gangrene as a result of a wound in-
[fol. 165] fection you say that shows up purple?

A. Gangrene with a wound infection has nothing to do with the color of the wound. I said every inflammation is characterized by redness. You call it purple. I call it redness.

Q. I am talking of the wound; it is when an infection sets in followed by redness?

A. You have an infection. If the gangrene is around the wound you have bluish.

Q. What is the color of the gangrene away from the wound?

A. Bluish black.

Q. What is the color of the wound?

A. It depends on where it is.

Q. Take a wound on the foot?

A. Every wound is characterized by a skin inflammation.

Q. Which is red?

A. Yes.

Q. Therefore in the case of gangrene with a wound infection you can pick out the spot by the wound infection?

A. It depends on where. In the case of tetanus where a wound comes a few days after, I remember a case where I had to look around for the wound.

Q. Take a wound an inch and a half long which has bled somewhat, that would not disappear in a week?

A. It would not disappear in a week. You would find some evidence.

Q. If you had found no evidence of a wound, if you had examined this man eight or nine days after the injury you would change your opinion as to the procuring cause of this gangrene?

A. If I found no evidence of a wound?

Q. Yes?

A. I would say the wound had not produced it, but some other cause produced it.

Q. You never saw Redman until 1933?
A. Never.
Q. Never say this gangrene on his foot?
A. No.
[fol. 166] Q. At the time you examined him did you have a hospital record?
A. I had a copy of the hospital record.
Q. You took the history of the case itself?
A. I had the hospital records later—I am not sure.
Q. You didn't have them until you got in court here, did you?
A. Yes.
Q. The full hospital record?
A. Yes.
Q. Where?
A. I have seen a copy of the hospital record. The original records I have not seen at all.
Q. Have you seen a copy of these records consisting of 60 or 70 pages?
A. Those are nurses' notes.

Mr. Graves: These are the very records he wouldn't let me put in evidence. Now he is examining the doctor about records he wouldn't let me put in evidence. I am only too glad to have them go in.

The Court: He hasn't examined as to the contents of them yet.

Q. Were you subpœnaed to come to court here?
A. No, sir.
Q. You came to court voluntarily?
A. I came to court at the request of Mr. Graves, over the telephone.
Q. To testify as an expert witness?
A. Yes, sir.
Q. Do you testify frequently as an expert witness?
A. Not very often.
Q. How often?
A. Some years five or six times, eight times, ten times.
Q. How many times in the last five years would you say you have testified as an expert witness?
A. Twenty or thirty times.
[fol. 167] Q. In any one of these twenty or thirty times, did you testify as an expert on gangrene?

A. No, sir.

Q. Did you make any agreement as to payment for your services?

A. I have a fixed charge for that.

Q. What is your charge?

A. $100 for a session.

Q. And you expect that in this case?

A. Yes.

Q. Whether the case is won or lost?

A. Absolutely. I am entirely disinterested.

Redirect examination.

By Mr. Graves:

Q. Now, Doctor, will you tell the jury whether or not a scratch of a foot would be noticeable nine or ten days after?

A. Not if it is healed up.

The Court: The question was, would a scratch sufficient to cause an infection heal up in ten days?

The Witness: No.

Q. You say a scratch would not be healed in ten days?

A. If it is followed by infection and inflammation, then it would not have healed up.

Q. If a doctor looks at the skin or flesh that was scratched ten days after it was scratched would he be able to say there was a scratch there?

A. If it was followed by an inflammation and a pus formation, but if there was no pus formation at that time it could be perfectly healed up and he might conceal where it was.

Q. Would a scab fall off in ten days if there was no inflammation?

A. No.

By Mr. Graves:

Q. Does it depend upon the character of the [fol. 168] scratch?

A. It depends on the character of the scratch, and the character of the infection and also the condition of the patient's skin, but a scab forms invariably from either a blood coagulation or pus formation.

Q. Suppose it heals and there was no pus formation it would be impossible to see it?

A. If the blisters had come where the wound was you couldn't see the scar, you would see the blister.

Q. That is, of the skin was broken by the blister?

A. You wouldn't see the scratch.

Q. Where you have inflammation in the case of a man of colored pigment in his skin, isn't it so you would be more apt to have a purplish color than a pure red?

A. Yes.

Q. Now there are various sorts of microbes, aren't there?

A. Numerous.

Q. 150?

A. I couldn't enumerate.

Q. There are myriads?

A. Yes, various. In one species of pneumo-coccus we have eight.

Q. There is one particular kind called the gaseous microbe?

A. Yes.

Q. And that causes inflammation?

A. With pus between the tissues and swelling.

Q. But there are a great many numbers of bacteria which will cause inflammation without pus?

A. Yes, without pus.

Q. Now, Doctor, will you explain the maximum of the production of gangrene in this particular case?

Mr. Crawford: I object on the ground this doctor never saw this particular case, or the case described in your hypothetical question put to him. I object to the form of the question.

[fol. 169] Q. Will you explain the maximum of the production of gangrene in the case which was hypothetically put to you yesterday?

Mr. Crawford: I object to the form of the question.

By the Court:

Q. Doctor, can you explain the maximum by which infection comes to the blood and then goes to the part?

A. You didn't allow me to——

By Mr. Graves:

Q. I understood you to say yesterday the infection may spread into the system and then into the blood and through the blood may affect a certain part of the body, sometimes the veins and arteries and then they would stop the flow of blood and cause an infection?

A. Yes, but I didn't explain how.

Q. You explained it spreads through the blood until it reaches a certain part and brings the stoppage of the flow of blood, didn't you?

Mr. Crawford: I would like to have the answer.

The Court: Is that cross examination?

Mr. Graves: It is redirect. I think he is entitled to explain how he arrives at his conclusion.

The Court: Why shouldn't he have the opportunity that he had on his direct examination?

Mr. Graves: It is within your Honor's discretion to allow [fol. 170] it on redirect. I assumed they would ask for it, but they didn't, and I would like to have the opportunity of giving it.

The Court: What do you want to know?

Mr. Graves: The reasons for his answer to the hypothetical question.

The Court: He has given his opinion; do you want to cross-examine him?

Mr. Graves: No, sir.

The Court: It seems to me that is what you are doing. He has stated his opinion.

By Mr. Graves:

Q. Now, Doctor, when a man gets a scratch on any part of his body, what is the ordinary medical treatment to be applied to prevent infection?

Mr. Crawford: I object to that. We haven't evidence of a scratch in this case, we have evidence of a wound.

Q. Any opening sufficient to draw blood?

The Court: There was no doctor aboard the ship at the time. The question is what they did was proper under the circumstances. There was no doctor there to give advice.

Mr. Graves: It is a question whether they should have had more supplies aboard the ship.

The Court: The jury are to be the judge of that, whether they were negligent or not.

Mr. Graves: The plaintiff has testified they had no medicine. The steward had no medicine, and it is a question [fol. 171] whether they might have applied first aid remedies.

The Court: I might have used iodine. That doesn't prove anything.

Mr. Crawford: We take an exception.

The Court: You asked him about a scratch, you didn't ask whether it is customary for a ship to carry a medicine chest.

Mr. Graves: I didn't think he would be competent to testify what a ship ought to carry.

The Court: Isn't that what you want to get at; wasn't that in your mind?

Mr. Graves: What they should have applied.

The Court: Many different things can apply to different people; different doctors would apply different things.

Mr. Graves: Antiseptic, any antiseptic.

Q. Can you say with reasonable certainty that if antiseptics had been properly applied to the man mentioned in the hypothetical case put to you yesterday within a period of 36 hours after he sustained his initial injury, whether or not the inflammation could have been averted and the gangrene prevented?

A. Yes.

The Court: Within 36 hours?

The Witness: If within 36 hours the wound had been properly cleaned, there is a possibility——

The Court: He didn't ask about possibility.

Mr. Graves: I ask with reasonable certainty.

The Witness: Yes.

[fol. 172] By the Court:

Q. You used the word "possibility." Do you mean applying an antiseptic to that wound 36 hours after the abrasion there was a probability of avoiding the infection?

A. I say within 36 hours there is a probability we might have avoided it. It is not certain.

Q. You say it is reasonably certain if a person has a wound and it is cleaned and an antiseptic applied within 36 hours there is a reasonable chance of preventing infection?

A. Yes, there are any number of cases. It depends on the character of the constitution of the patient, but there are any number of cases where within thirty-six hours without being exposed to further infection we have avoided a great deal of trouble.

Q. Even with infection there is a probability the leg might be saved?

Mr. Crawford: I object to that. The question must be a hypothetical question.

By Mr. Graves:

Q. Assuming this particular man had within a period of 36 hours gotten some inflammation which had set in, could that inflammation have been checked by reasonable, prompt surgical measures, to prevent the amputation of this leg and the setting in of gangrene?

The Court: Have you enough assumptions there to stake your reputation on?

The Witness: Yes, sir.

The Court: Sufficient?

The Witness: Yes, sir.

[fol. 173] The Court: And you can speak with reasonable certainty?

The Witness: Yes, sir.

Mr. Crawford: I object to the question on the ground it has not assumed one of the important factors in this case and that is there was a wound present. I think we ought to assume in the question to the doctor the presence of a wound.

Mr. Graves: I am readopting yesterday's hypothetical question in this question.

Mr. Crawford: If that is incorporated I withdraw my objection.

Q. Will you tell the jury as to that, what your opinion is?

A. The leg might have been saved.

Q. With reasonable certainty can you say it could have?

A. Yes.

Mr. Crawford: No more cross.

The Court: You said it might have been saved?

The Witness: Yes—we are proceeding on nothing—each case is individual.

Mr. Graves: But with reasonable certainty it could have been saved?

The Witness: Yes.

Mr. Crawford: I ask for a stipulation from counsel that this plaintiff was examined by Dr. Nelson Cornell.

Mr. Graves: I so stipulate, and I also ask that it be stipulated that the defendant has the testimony of the steward and has that testimony in his possession.

Mr. Crawford: I think that is incompetent, immaterial [fol. 174] and irrelevant. I can take forty depositions and produce such as I wish.

Mr. Graves: I would like to have it appear that the testimony has been taken.

Mr. Crawford: I object to it and I object to further remarks on the subject.

The Court: If that testimony helps you use it.

Mr. Graves: Plaintiff rests.

Motion to Dismiss

Mr. Crawford: I move to dismiss all three causes of action stated.

The Court: How many causes of action?

Mr. Crawford: The first cause of action that we were negligent in permitting these boxes to be on the deck as the result of which plaintiff got his wound. The second cause of action is we did not treat him properly and as the result thereof——

The Court: I only see two causes of action.

Mr. Crawford: The third that Mr. Graves referred to is contained in the wherefore clause of the complaint. Mr. Graves referred to a cause of action in maintenance and cure, in the opening to the jury.

The Court: How many causes of action have you pleaded, Mr. Graves?

Mr. Graves: The two main causes and maintenance and cure is included in the other. It is overshadowed by the other.

Mr. Crawford: I will address myself to those two causes of action. The first cause of action is based on the negligence of the ship or crew, officers or crew, in permitting

boxes to be on the deck in such position that this plaintiff [fol. 175] injured his foot, as the result of which infection occurred, followed by amputation. As to that we have the plaintiff's own evidence the fact that the passageway was clear at seven-thirty in the evening the day before; we have the further testimony of chief officer Burrows, which Mr. Graves established, that he came back on the ship at twelve or one o'clock, walked over the same passageway and the same ladder and at that time the lights were lit. Now assume for the purpose of argument that there were boxes there at five o'clock in the morning, who put them there. This isn't a case of res ipsa loquitur.

The Court: Did this ship carry passengers?

Mr. Crawford: It is not in evidence; there is nothing on that subject.

The Court: Did it carry other passengers. Plaintiff testified it was a small freighter—no passengers.

Mr. Crawford: He didn't testify to that.

The Court: It had to be put there by an employee if there were no passengers.

Mr. Crawford: Not necessarily. There is a ladder up to that ship. It doesn't mean necessarily our men put it there.

The Court: They put the plaintiff on the stand. They were in the harbor anyway and you wouldn't know that he didn't make the voyage with the ship, and anyway the ship was in the harbor. She had not sailed yet. Then the question would survive whether if there is no proof who put it there whether it is the duty of the steamship company to keep the ship lighted and its decks free and clear [fol. 176] at all times. I don't know; the jury may say it is or is not.

Mr. Crawford: The case can only go to the jury on some question of negligence on the part of this crew. There is no testimony the crew were working after seven-thirty at night.

The Court: Is it the duty, and if it is the duty of the shipowner to keep the deck clear at all times so it is safe to work on the deck, and if he failed in that, wouldn't that be some element of negligence?

Mr. Crawford: I think if the decks were cleaned at midnight, to say they would have to have a man go around all night to keep the decks clear——

The Court: I should expect a passenger ship would be kept clear at all times. I don't know in this case. It is for the jury to say whether it is the duty to keep the decks spic and span.

Mr. Crawford: We are only responsible for reasonable care. We are not insurers of this man.

The Court: You admit this, don't you, that the decks should be kept clean and clear from his quarters to his kitchen.

Mr. Crawford: I am taking the testimony all through on this argument only. Of course, the credibility would be for the jury. I appreciate that.

The Court: What is done now, gentlemen of the jury, is only argument, and you are not to infer from the argument that the defendant was negligent, nor are you to infer from what the Court says that it was negligent. The Court [fol. 177] expresses no opinion. That is for you gentlemen to determine, so you are not to be influenced by this argument, or the motion bringing about this argument.

Mr. Crawford: Now my second point, forgetting the negligence, if there was some, and turning to the proof in this case on proximate cause, the plaintiff called a doctor who treated and performed the operation on this man in the hospital, and the doctor said there was no evidence whatever on that fact, that in his opinion the gangrene he saw there was a dry gangrene which was not and could not be caused by infection from a wound. That is plaintiff's testimony and they are bound by it.

The Court: There was another doctor, and he said that that injury could reasonably have been the competent producing cause of the condition.

Mr. Crawford: He said two other things this morning on my cross-examination. He said if there had been a wound there sufficient to bleed that that wound would be visible eight or nine days later when this man went to the hospital.

The Court: He qualified that, unless there was inflammation or swelling. If there was inflammation or swelling then it would be visible. If there was no inflammation or swelling then it could be invisible.

Mr. Crawford: He said if eight or nine days later had he seen this man he would change his testimony and he [fol. 178] would not say the wound was the procuring cause of this gangrene, and I was taking the two doctors together and the evidence for what it is worth. Not having

seen this man for three years after it happened the plaintiff hasn't made out any case whatever.

The Court: Isn't this the case, in which he said, giving the symptoms described, he said with reasonable certainty that could have been a competent producing cause for the injury he sustained. You may argue that to the jury. The question for me to decide is whether there is anything in the record at all which makes it a question of fact that should be submitted to the jury.

Mr. Crawford: I say when there is no wound visible and the experts statement is if there was no visible wound where there had been a bleeding wound eight days before then, you have no gangrene caused by the wound, but some other kind of gangrene.

The Court: State your further ground.

Mr. Crawford: Those are my other grounds.

The Court: Motion denied; I will reserve my decision.

Dr. Joseph Perez, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Crawford:

Q. You are a physician and surgeon duly licensed to practice in the State of New York?

A. I am.

[fol. 179] Q. How long have you been practicing medicine?

A. From 1916 until at present.

Q. Did you get a degree from any medical college?

A. M.D. from the Technology of Medicine, Madrid, Spain, and Master of Medicine and Surgery from the Sorbonne, in Paris, France.

Q. Did you have any experience in the World War?

A. I was a lieutenant and afterwards a captain in the World War from 1916 to 1918 in the French Medical Corps.

Q. In connection with that experience did you have occasion to treat many cases of gangrene?

A. I certainly did.

Q. How many cases of gangrene would you say you handled during the period of the war, roughly?

A. From traumatic injuries in the World War more than a thousand.

Q. Are you connected with any hospital in the City of New York?

A. I have been attending surgeon at the United Hospital, located at 1544 St. Johns Place, Brooklyn, hospital capacity 300 beds, actively surgical.

Q. What type of work do you do there, Doctor?

A. General surgery.

Q. Were you connected with the Cumberland Street Hospital in 1930?

A. I have been, and I have been again on the staff of the hospital.

Q. In the Cumberland Hospital?

A. Yes.

Q. And you were before 1930?

A. Yes, I was in 1920.

Q. What was your work there?

A. I was a resident surgeon, attending to the house cases in surgery.

Q. At that time did you have anything to do with cases of gangrene?

A. Yes.

Q. Are you familiar with all types of gangrene?

A. I am.

[fol. 180] Q. Now, Doctor, do you recall the plaintiff in this case, Donald Redman, sitting on the first bench in the rear?

A. I do recognize him.

Q. Do you remember when he came to the hospital February 22, 1930?

A. I do.

Q. Now, when was the first time you saw him in the hospital, Doctor?

A. As soon as the ambulance surgeon brought the case into the hospital.

Q. Were you notified to see this man?

A. Yes.

Q. Did you go to see him right away?

A. Right away.

Q. Where did you see him; where was he?

A. Right in bed.

Q. What did you do then?

A. First I asked him some questions in relation to the accident, how it happened and all thus far.

Q. Did he tell you?

A. He told me.

Q. Did you write that down?

A. I did.

Q. I show you a paper——

The Court: Ask him without showing the paper. Perhaps he don't need his recollection refreshed.

Q. Do you recall without refreshing your recollection as to what this man told you and what you wrote down at the time?

A. Well, I can recall better if you are so kind——

Mr. Crawford: If the Court please, I want to put this in evidence, anyway, because it is a record made at the time by the doctor.

Q. I show you this paper and ask you if that is the writing you refer to having been made at that time?

A. That is my own handwriting.

[fol. 181] Q. How many pages does that consist of?

A. Two pages exactly.

Mr. Crawford: I offer that paper in evidence.

Mr. Graves: I object on the ground it is hearsay.

The Court: Do you object to the hospital record. Have you any authority which shows that a record made by a doctor is competent evidence? He can refresh his memory from the hospital records.

Mr. Graves: There is a decision of the Court of Appeals and a great difference of opinion as to the meaning of it.

The Court: I am familiar with the comparatively recent amendment of the Civil Practice Act, but I doubt whether that applies to a record made by a physician. He can refresh his memory. If he cannot refresh his memory, that is different. If a record was made and if he doesn't recollect without the use of that, that would make it admissible. He is under oath now; he was not when he wrote that. The Court feels quite confident of its ruling.

Q. Doctor, will you refresh your recollection——

The Court: Maybe he doesn't need to have it refreshed.

Mr. Crawford: He said he would like to look at it.

Q. Tell us what you remember about the history of this case as Redman told you at the time?

[fol. 182] A. I think I have a keen memory but I ask for the records in order to be more exact, but I do recollect very well the case.

By the Court:

Q. When did you see that record last?

A. About four days ago.

Q. Tell us what you remember happened at that time; do you have to refresh your memory about something else?

A. I was notified by the chief nurse on the floor that a patient arrived over there, brought by the ambulance surgeon, that it was a case of gangrene, consequently—I was then in charge of surgery—I responded to the call immediately. I went to his bed; I examined his external appearance; I found him laying down in bed suffering from sharp pains of his affected foot. I asked him what happened. Then he claimed while he was working on some steamship line he felt a few sharp pains in the foot and never mentioned to me any accident.

The Court: You are a doctor, a man of intelligence; don't tell us what he did not mention; tell us what he did mention.

The Witness: The history has two points.

Q. But you are now asked—forget about the history—what did he tell you?

A. He said he had sharp pains in the affected area of the foot for a few days before he landed in the hospital. He asked his friends and somebody else, what was good for his foot. Somebody told him liniment; somebody told him hot water; so he did his best. Seeing that the sickness was not improving and the foot getting worse, he decided to call [fol. 183] the ambulance and the ambulance brought the case to the hospital. I proceeded with the examination and I found the history of the family negative. Ordinary diseases of childhood having no relation whatsoever to the present sickness. He denied venereal diseases. We don't trust the patients very much on that. The patient confessed that he has had alcoholic habits. As matter of fact he told me in the history, he stated that he was slightly intoxicated a few days before he has had all those pains, but the day he came to the hospital, within three days before

he came to the hospital—I examined the head and the symptoms of the pupils of the eyes, ears, nose and throat. No reflexes present and no symptoms having any relation with the present surgical disease. Negative, just heart and lungs, medically and surgically competent. That is a word we use in the best schools over here, like Post Graduate, when we say medically and surgically competent we mean that all the symptoms biologically are absent and there is no use writing so many pages of history, which don't mean anything. I examined the leg affected and I found from the lower third of the foot to the toes, a complete line of demarkation of an area which was darker than the other one of normal color.

Q. Of normal color?

A. Yes. I didn't observe any signs of previous injury to explain the presence of these surgical processes but from the line of demarkation to the toes I found dryness of the whole area affected or blackish, purplish color, and entirely mummified, I mean des-iccated.

Q. What do you mean by that?

A. No offensive odor and circulation from the area of demarkation to the toes was entirely distinguished or non-present.

[fol. 184] Q. Where was that line of demarkation as nearly as you can show it on your own shoe?

A. From the middle of the shoe lace line to the toes (indicating shoe lace line on a pair of low shoes similar to the shoes worn by the plaintiff when he was testifying on the stand). That is what I recall.

Q. Doctor, did you see any evidence on this man on the day he entered the hospital or any other day of a wound an inch and a half long at a point half an inch or thereabouts on the instep above the line of a low shoe of ordinary size?

A. None were present.

By the Court:

Q. On what day did you examine him?

A. The date I don't recall, your Honor.

The Court: Refresh his memory.

Q. Look at the record made by you at the time and state what date it was?

A. 2/23/30.

The Court: February 23rd, 1930?
The Witness: Yes, sir.

By Mr. Crawford:

Q. Doctor, I call your attention to these notes made by you at the time and pointing out particularly the first note on the page I ask you if you are not mistaken in the date?
A. I beg your pardon. This is the examination note from the hospital down to the dispensary.

The Court: Can you refresh your memory and tell us [fol. 185] what day you examined him; how many times did you examine him?
The Witness: I examined the patient two times the same day, but the date I cannot recall unless I see the date I marked.

Q. Refresh your recollection by the hospital records, by the records of your hospital, and state what day that was when he first came in if you can.

Mr. Graves: The day you first examined him.

A. February 22nd, 1930.

The Court: February 22nd or 23rd?
The Witness: February 22nd.

Q. Do you know, Doctor, that you were the first doctor in the hospital to examine this man after he came in?

Mr. Graves: I object to that. The witness isn't competent to testify to that.
The Court: Sustained. So far as you know, were you the first to examine him at the hospital?
The Witness: The only one with capacity to act because all internes were under my orders.
The Court: So far as you know you were the first doctor to see him in the hospital?
The Witness: I was.

Q. Were you the doctor on duty that day in the hospital [fol. 186] that examined all patients that came in?
A. I was.
Q. Were any other doctors there at that time?
A. There were others, but not for surgical cases.

Q. Were you the only one who had anything to do with examining new cases for surgical emergency work?

A. In that ward, yes.

Q. How many times did you talk to this plaintiff, Redman, Doctor?

A. I talked the same day when I was condensing the whole history. Our duty is to talk to the patient and to relate the history, the past history, and the complete development of the disease until the patient arrives at the hospital. Those statements must be truthful. We are obliged to repeat all questions two or three times.

Q. After this first day you talked to him several other times?

A. Yes.

Q. Did he at any other time the first day or any other day say anything about a wound on his foot, or running a nail in his foot?

A. He never told me. It is our duty to keep in touch with the patient in order if they want to rectify some mistake of past history—sometimes a patient may arrive at the hospital under such circumstances that it is our duty to see if the statements are true.

Q. You had a great many cases during the war and some since involving gangrene resulting from an infection of a wound?

A. Yes, a great many cases.

Q. Will you state what type of gangrene that is?

A. Moist gangrene or humid gangrene, never dry gangrene.

Q. Do you say in all your experience in the thousands of cases you have had in the war and otherwise, that was a case of moist gangrene?

A. I never would. The difference between wet gangrene [fol. 187] and dry gangrene is expressed by the meaning of the word. Wet or moist or humid is a gangrene which has more the presence of exudity and more offensive odor. Dry gangrene is dry, dessicated, without offensive odor, and there is a complete visible line of demarkation——

Q. That is the line of demarkation between the healthy part and——

A. The line of demarkation is gradually presented, the line of demarkation is not present so plainly as in the dry gangrene. The discoloration appears gradually from the

area affected in dry gangrene, about four or five inches from the dry gangrene, with the color from dark green, purple—dark colors. The demarkation of the line of wet gangrene or moist gangrene is gradual, while the contour in dry gangrene is sharp between the area affected and the area healthy.

Q. Was there a complete line of demarkation in this case of Redman?

A. A complete line of demarkation.

Q. From the other symptoms could you state whether or not this was a case of dry or wet gangrene?

A. Dry gangrene.

Q. Any doubt about that?

A. Absolutely not.

Q. What causes dry gangrene or caused it in this case?

A. In this case my opinion is the dry gangrene was caused by systemic deposition that the patient has—am I directed to say?

Mr. Crawford: Any objection?

(No objection.)

The Witness: I was not in court the other day——

Q. You cannot say that?

A. Raynaud's disease, it is called by the Frenchmen, was [fol. 188] discovered in France about 75 years ago. This disease is produced by arteriasis obliterans—talking plain English it means the channel of the arteries, or the thickening of the wall of the arteries are increased and is not produced by precipitation of calcium substances. It is an entirely different disease than arteriosclerosis.

Q. Arteriosclerosis is hardening of the walls of the arteries?

A. Yes.

The Court: And this that you describe is a deposition of some chemical substance which makes the artery smaller?

The Witness: The circulation is less until it provides a complete stopping of the circulation, and consequently it is a case of dry gangrene.

Q. Dry gangrene will develop from a stoppage in the arteries?

A. Of course.

Q. Doctor, you recall that there was a preliminary operation performed in this case, before the amputation, called sympathectomy?

A. Yes, sir.

Q. Will you state whether or not that operation is ever performed in cases of infectious gangrene resulting from a wound?

A. Only for dry gangrene.

By the Court:

Q. Only for what?

A. Dry gangrene.

Q. It is performed for dry gangrene?

A. Right.

By Mr. Crawford:

Q. Doctor, in cases of moist gangrene, of gangrene resulting from wound infection, isn't it usual to amputate rather promptly?

A. Yes.

[fol. 189] Q. What is the reason for that?

A. Try to save the patient's life.

Mr. Graves: I object, if your Honor please, to all this talk about what these different things were for. Let us get an opinion as to what this man had and what the cause was in other people's opinion.

Mr. Crawford: Will you please repeat the last question, Mr. Stenographer?

(Question repeated.)

Mr. Graves: In other words, he is trying to prove what this man had by what other people thought, that are not on the witness stand. Let us find out what this man thinks and the reason for it.

The Court: Assume facts and let him express opinions. Assume facts—that is what he is here for.

Mr. Graves: Put a hypothetical question.

Mr. Crawford: You can do that. You may cross examine.

Cross-examination.

By Mr. Graves:

Q. Doctor, what did you say this man really had?

A. What?

Q. What did he have; what kind of gangrene?
A. Dry gangrene.
Q. That does not mean anything at all, does it?
A. In Europe, perhaps.

By the Court:

Q. Doctor, that is no way to answer. Is there any difference?
A. I can be sarcastic myself.

The Court: He is not sarcastic.

[fol. 190] By Mr. Graves:

Q. Dry gangrene is a technical name, and it simply describes the condition, doesn't it?
A. No, it describes the disease.
Q. You say that dry gangrene is a separate disease of itself?
A. I didn't say it that way; I beg your pardon.

By the Court:

Q. Is dry gangrene a different disease from wet gangrene?
A. From moist gangrene.
Q. Are they different?
A. Entirely different.
Q. Pardon me?
A. Entirely different.
Q. Do they come from different causes?
A. Different causes.

By Mr. Graves:

Q. The only difference, isn't it, between these two species of gangrene, is that when the blood supply is cut off in the artery, if the tissues are moist at the time, you have moist gangrene; but, if the blood supply is already out at the time, you have dry gangrene—isn't that right?
A. No, not that. I did not say that, either.
Q. Is that so or is it not so?
A. It is not so, and I did not say so.
Q. Do you agree with DaCosta on the subject of gangrene?
A. I regard DaCosta as one of the best——

Q. Is he a good authority?
A. What?
Q. In your opinion is he a good authority on the subject of gangrene?
A. I wouldn't dare to say against him.

By the Court:

Q. Have you heard of him?
A. He is one of the best surgeons in America.

[fol. 191] By Mr. Graves:

Q. Do you agree with this statement when he says: "Classification—Gangrene is divided into the following three great groups: (1) Dry gangrene, which is due to circulatory interference, the arterial supply being decreased or cut off. The tissues dry and mummify. (2) Moist gangrene, which is due to interference not only with arterial ingress, but also with venous return or capillary circulation, the dead parts remaining moist. (3) Microbic gangrene, arising from virulent bacteria. In this form the bacterial process causes the gangrene, and is not merely associated with it."

The above classification is by DaCosta. It indicates that there is an essential difference between dry gangrene and moist gangrene. Do you agree with that statement?

By the Court:

Q. Do you agree with it; yes or no?
A. I do not trust that statement unless I see the original of DaCosta.

By Mr. Graves:

Q. Do you agree with that statement?
A. I do agree with DaCosta's statement, but I don't trust that.
Q. You don't trust me?
A. No.
Q. Begin with the word "Classification" on page 87, Edition of 1931.
A. May I read it?
Q. Yes; read it.
A. "Mortification, or gangrene, is death in mass of a portion of the living body—the dead portion being large

[fol. 192] enough to be visible—in contrast to ulceration, or molecular death, in which the dead particles have been liquified, cannot be seen, and are cast away. When all the tissues of a part are dead, the process is spoken of as sphacelus. Gangrene is, in reality, a form of necrosis, but clinically the term necrosis is restricted to molar death of bone or in death of parts below the surface en masse. In gangrene a portion of tissue dies because of anemia and the dead portions may either dessicate or putrefy. Gangrene may be due to tissue injury, either chemical or mechanical, to heat or cold, to failure of the general health, to circulatory obstruction, to nerve disorder, the nerves involved being the vasomotor or possibly the trophic, or to microbic infection. A microbic poison can directly destroy tissues. It can indirectly destroy them by causing such inflammation that the products obstruct the circulation, but gangrene can occur where no bacteria are present. The essential cause of gangrene is that the tissues are cut off from a due supply of nourishment, and cell-nourishment is no longer possible. In other words, the essential cause of gangrene is the cutting off of arterial blood.

"DeNancrede says: 'Indeed, except when the traumatism physically disintegrates tissues, as a stone is reduced to powder, heat or strong acids physically destroy structure, or cold suspends cellular nutrition so long that when this nutrition becomes a physical possibility with vital metabolism cannot be resumed, gangrene always results from total deprivation of pabulum.' "

You better read the part that I read. Go on from that point, beginning with the word "Classification".

[fol. 193] The Court: He did not ask you about that.

Q. You stopped at the very point I asked you to read. Start reading from here (indicating). Begin with the word "Classification" in the middle of the page.

A. "Classification.—Gangrene is divided into the following three great groups: (1) Dry Gangrene, which is due to circulatory interference, the arterial supply being decreased or cut off. The tissues dry and mummify. (2) Moist Gangrene, which is due to interference not only with arterial ingress, but also with venous return or capillary circulation, the dead parts remaining moist. (3) Microbic Gangrene, arising from virulent bacteria. In this form the

bacterial process causes the gangrene, and is not merely associated with it."

Q. Do you agree with that statement or not?

A. I agree with DaCosta, sure.

Q. The only difference then between dry and wet gangrene is that in the case of dry gangrene the tissues are drained of liquid, but, in wet gangrene, which is due to interference not only with arterial ingress, but also with venous return or capillary circulation, the arteries in that case are moist and in that case you have a moist variety; isn't that true?

A. I didn't say that.

Q. You do not agree with that?

A. No.

Q. Didn't you just read that?

A. No, you are masquerading what Dr. DaCosta said.

Q. Masquerading?

A. Yes. We have three groups of gangrene; one is dry, the other moist and the other one senile.

Q. Do you agree with that statement?

A. I beg your pardon, I am speaking.

[fol. 194] Q. Go ahead, Doctor.

A. Dry gangrene is the variety in which the circulation is entirely stopped. It means in dry gangrene—you can not have dry gangrene by a trauma injury only. The circulation in the arteries has stopped. Moist gangrene can be produced by many causes; an infection caused by bacteria which produces indirectly gangrene.

Q. You do not agree with the statement that moist gangrene is due to interference not only with arterial ingress but also with venous return or capillary circulation; you do not agree with that statement?

A. Not in the form you put it.

Q. We will drop that. You say this man had dry gangrene?

A. He had dry gangrene.

Q. How many different kinds of dry gangrene are there?

A. Just one, as far as I know.

Q. What do you call it?

A. Dry gangrene.

Q. You mean to say that dry gangrene is simply a description, a classification of gangrene that shows that the tissues are dry at the time, isn't that true?

A. That is right.

Q. And it simply describes it, but has nothing to do with the cause?

A. I am sorry; I don't understand you, or you misunderstood me.

Q. We don't understand each other. We will drop that.

A. Pardon me, I get your point, but you do not want to listen to me.

Q. Do you understand English?

A. I was born in England, despite the fact that I am a Spaniard.

Q. Where did you learn your English?

A. In England.

Q. And do you speak better English today—I am not criticising your English—but, is your accent less pronounced today than it was three years ago?

A. My accent has the typical accent of the surroundings where I am from, of which I am proud. It may sound awful [fol. 195] to you but it sounds cute to me.

Q. Let us be honest, Doctor. As a matter of fact, it is difficult for you, isn't it——

A. Not at all; on the contrary.

Q. You haven't had a question put to you. Please do not answer until you hear the question. Isn't it difficult for you to understand English at times?

A. Not at all.

Q. You learned your English in England, didn't you?

A. I resent that. That has nothing to do with this matter.

Q. I am not insulting you. We are trying to get the facts. You have the wrong idea about this.

By the Court:

Q. He is asking you whether you find any difficulty in understanding questions in English?

A. Not at all.

By Mr. Graves:

Q. You know that different people in the British Empire speak with different accents?

A. That has nothing to do with the English. You might have a different accent; you might have slang, it is English just the same.

By the Court:

Q. This is not a trial that involves English, Doctor. I will assume you read English perfectly. I am talking about understanding English and whether or not you have any trouble in understanding an Oxford man speaking English?

A. What?

[fol. 196] By Mr. Graves:

Q. Answer the Court's question.

The Court: What has that to do with this case. The plaintiff was from Barbados.

By the Court:

Q. Is that true?

A. I have no difficulty because I was in Jamaica for two years.

Q. What part of Jamaica?

A. In Falmouth, Jamaica, sir.

Q. The people in Barbados speak with a different accent than they do in England?

A. Certainly. I have English servants that speak very peculiarly but yet I understand them pretty well.

Q. To get back to your testimony, this man had dry gangrene?

A. Yes.

By Mr. Graves:

Q. I have not yet heard you say what the cause of it was.

A. The cause is produced by an obstacle to the circulation; by a disease of the arteries or by any regular obstruction.

Q. I am talking about this man, this plaintiff. What was the cause of his gangrene, in your opinion?

A. In my opinion?

Q. Yes.

A. It is a disease that he has had and we found in the operation.

Q. Have you any opinion on the subject whatever?

A. Yes, it is a disease of the arteries; endo-arteritis.

Q. You said something about arthritis?

A. I said endo-arteritis. I am mentioning different diseases that are similar and yet not dry gangrene.

[fol. 197] Q. You are talking about other cases that have nothing to do with this case?

A. Right.

By the Court:

Q. You thought he was asking you generally?

A. Yes.

By Mr. Graves:

Q. You are making a dissertation on this subject.

A. No.

Q. This man did not have Raynaud's disease, did he?

A. No.

Q. He did not have Bergeron's disease, did he?

A. No.

Q. He did not have senile gangrene?

A. No.

Q. But you say he had endo-arteritis?

A. Endo-arteritis.

Q. Endo?

A. Endo-arteritis.

Q. How do you spell endo?

A. E-n-d-o-arteritis.

Q. Endo-arteritis means nothing more or less than impaired arteries, is that true?

A. Yes.

Q. It simply means atherma in the arteries, is that correct?

A. No, no.

Q. It means impaired arteries, is that right?

A. Impaired.

Q. And that is something anybody can have?

A. Do you dare to say that?

Q. What?

A. I didn't say so.

Q. Can they or not?

A. Whoever has—you can have it or you can not.

Q. It can be caused by a great many different things, can it not?

A. I agree with you; it can be produced by three or four different things.

Q. Three or four?

A. Yes, at least: alcoholic conditions, syphilis disease, [fol. 198] diabetes in some cases—in some cases not—I said

syphilis, third degree, by abuse of sexuality, together with alcoholic habits, either isolated or associated. It can be produced by continous injections of any kind of dope or narcotic, as morphine, cocain, heroin, and all kinds of narcotics.

Q. Pneumonia too?

A. No, don't mix pneumonia.

Q. It can be caused by syphilis, can't it?

A. Yes.

Q. And it simply means impaired arteries?

A. That is right.

Q. It is not gangrene itself?

A. No.

Q. It is simply impaired arteries, isn't that right?

A. Don't draw your conclusions so quickly. You are asking me what can produce gangrene and I answered you, but, to describe dry gangrene, it cannot be produced from them because it can be produced by endo-arteritis, it can be produced by alcoholic conditions.

Q. This endo-arteritis that you speak of is nothing more or less than an impairment of the arteries so that the arteries are narrowed in their passageway, isn't that right?

A. Right.

Q. And that condition has to be aggravated and on top of that you will have gangrene?

A. Not at all.

Q. No?

A. No. Dry gangrene is the end of such disease.

Q. Doctor, you have got a professional reputation at stake, have you not?

A. Yes.

Q. Assume that a man had endo-arteritis; suppose the patient has that, you would not say, would you, that if a nail were to enter his foot and cause infection that that nail would not bring on an inflammation which might pre-
[fol. 199] cipitate gangrene?

A. If the nail is present, perhaps, and perhaps not.

Q. Well, it could, could it not?

A. What?

Q. It could?

A. It could not.

Q. It could, didn't you say?

A. It could not.

Q. Didn't you say it might or might not?

A. I said when you are mentioning other causes that can bring on dry grangrene, I admit that in some cases necrosis can help it out. But, I wouldn't dare to say that has been the object, the cause to produce such a particular process.

Mr. Graves: Will the stenographer please repeat the last question.

(Question read.)

A. Perhaps, and perhaps not.

Q. Perhaps, and perhaps not, is that right?

A. Perhaps, because there is no proof—there is no perfection in science today.

Q. In other words, you do not know; it is not susceptible of perfection, so far as you think?

A. I don't mean I; all surgeons.

Q. You think nobody knows anything about it; is that the idea?

A. Certainly we can know about it; we must know.

Q. So far as you know, it is all guesswork?

A. In my concern and anybody else's concern.

Q. You say that based on your experience then you can only guess; so your testimony is only a guess?

A. No, I don't say my testimony is a guess.

Q. Well, it could produce gangrene, couldn't it; a nail entering a foot and causing infection in a person could if this endo-arteritis were present?

A. What kind of gangrene did you say?

[fol. 200] Q. Any kind of gangrene?

A. No, sir, no nail can produce a gangrene.

Q. No gangrene can be produced from a nail?

A. I say no dry gangrene can be produced by a nail, even if it was present.

Q. That is your opinion?

A. That is everybody's opinion in surgery.

Q. You never made any pathological tests of the tissues in this man's veins, did you, or his arteries?

A. The hospital took it. I am no pathologist.

Q. You say the hospital took them?

A. Yes.

Q. Look at that record and tell us where any special pathological tests or tests of the arteries were taken?

A. I don't think I have them here.

Q. You don't think so?

A. There is a report here about the dead tissues, yes, sir. Perhaps you can give me some help because whoever wrote this—I am not familiar with his penmanship.

Q. You can not read his penmanship?

A. I can not, but he can.

Q. He can?

A. Yes.

Q. All right; we will ask him to read that. Doctor, you testified on direct examination—you were asked on your direct examination to tell everything that you remembered from independent recollection, isn't that so—as to this man's case—is that so?

A. Right.

Q. And you recited a whole list of things that you remembered, is that right?

A. Yes.

Q. You did not memorize those things, did you?

A. Yes, I memorized them.

Q. You memorized the record?

A. No, I memorized it in my imagination because it is the property of the hospital, I am not supposed to destroy that, but take notes.

[fol. 201] Q. When did you memorize them?

A. When I was served with a subpœna from the lawyer representing this corporation because it is my privilege to read before I go to court, to read the case that I took care of.

Q. You did that of your own volition?

A. No——

Q. Did anybody pay you for testifying in this case?

A. Of course, I never go for fun.

Q. You are not being paid by us, are you?

A. I shall be paid.

Q. Not by me?

A. Not by you.

Q. Suppose the man had syphilis and his arteries are impaired, will a trauma or a subsequent infection light up or aggravate the latent syphilis and result in various types of diseases?

A. If the traumatic condition is not present in the foot affected, the gangrene is produced by the syphilis that he

has had because the characteristic of syphilis in the third degree is the endo-arteritis, which is a specific finding.

Q. The obliterating that you were talking about is simply a narrowing of the channels of the arteries, is that right?

A. No, that is the first degree, the second is the thrombosis which accompanies the stoppage of the arteries.

Q. You say this man had a thrombus?

A. Yes.

Q. Then you don't agree with Dr. Wikle that he had an embolism?

A. A what.

Q. An embolism?

A. It is the same thing.

Q. You mean to say that?

A. It is the same thing unless you refer to the English dictionary now.

Q. Wewill see what this gentleman says about it. You say he had a thrombus, is that right? A thrombus is a blood clot, isn't it?

A. It is a degree of coagulation.

Q. It is the same thing, isn't it?

[fol. 202] A. Thrombus and embolism is the same thing. It means different degrees of stoppage of circulation.

Q. Isn't it, a thrombus, a blood clot, and an embolism a piece of tissue or foreign matter, is it not?

A. Repeat that to me.

(Question read.)

A. Well, I beg your pardon. With all respect to Dr. Wikle, it seems to me he is entirely mistaken. An embolism and a thrombus is the same thing. A thrombus is the clot and an embolism is the clot transported far away.

Q. You say a thrombus by itself could cause gangrene?

A. When it is transported to the main arteries.

Q. You say that?

A. Yes.

Mr. Graves: I will ask to withdraw the witness for a few moments and to call him on that.

The Court: How many witnesses more have you?

Mr. Crawford: Four or five; they are mostly very short.

The Court: Maybe you will be able to find it during lunch. Perhaps the other side will consent to your reading in the

definition of an authority as to the meaning of the words "embolism" and "thrombosis". Is that what it is?

Mr. Graves: It is simply a statement.

Mr. Crawford: I do not think Mr. Graves should make a statement from his memory. He is not a doctor, after all.

Mr. Graves: I am going to ask him a question and then [fol. 203] I will ask leave to read the authority, if the answer I want is different. If it is not, all right.

The Court: It is all right, with the consent of the other side.

By Mr. Graves:

Q. You say this man had a thrombus, is that right?

A. I say that when the operating surgeons——

Q. I am asking you. Do you say that this man had a thrombus?

A. That is what I say. I am telling no lie. I say after the man was operated on we found a thrombus in the arteries.

Q. You found a thrombus?

A. Yes.

Q. Did you open the arteries?

A. They did.

Q. You did?

A. The surgeons.

Q. What arteries did they open?

A. Never mind—he will tell you.

Q. I want to know. You say he opened the arteries. Which did he open?

A. I was not present.

Q. Doctor, tell us—you made the statement that this doctor or these other doctors at the hospital opened his arteries. Tell us what arteries they opened and give us the names of the arteries they opened and just where is was done?

A. I say, when the surgeon operated and dissected it, to satisfy his curiosity and at the same time to see what was wrong with the arteries, he found a thrombus.

Q. Who amputated this limb?

A. Dr. Shatara.

Q. You say he satisfied his curiosity?

A. Not only his curiosity—but, it was his duty.

Q. What is that?

A. Not only his curiosity, it was his duty.

[fol. 204] Q. What is that?

A. Not only his curiosity, it was his duty.
Q. Is he in court?
A. Yes.
Q. One more question. A thrombus in and of itself very rarely causes gangrene; a pure thrombus?
A. I did not say so.
Q. You do not agree with that?
A. No.
Q. You say there is a thrombus in this case and you do not agree with Dr. Wikle; you say it is an embolism?
A. You are misunderstanding. A thrombus and an embolism is the same thing.
Q. You say it is the same thing?
A. It is the same thing.
Q. You had some days off in the hospital, didn't you?
A. Not at that time.
Q. Not at all? Did you work every day of the week?
A. All the time. I was getting paid from the city.
Q. You are supposed to get the history of a patient the moment he comes to the hospital, is that correct?
A. Yes, sir.
Q. And you took the history of the 22nd of February, 1930?
A. Yes.
Q. Are you positive of that?
A. Positive.
Q. At first you said the 23rd and then you said the 22nd?
A. That is not my fault.
Q. You are positive of that?
A. Positive.

Mr. Graves: That is all.

Alfred O. Suessmuth, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Crawford:

Q. Mr. Suessmuth, where do you live?
A. Passaic, New Jersey, 70 Grove Street.

[fol. 205] Q. And in March, 1931, did you have an office at 45 Broadway, New York City?

A. That is right.

Q. Did Donald Redman, the plaintiff in this case, come to your office in connection with the adjustment of his claim?

A. Yes, sir.

Q. And was that the first time you had ever seen him?

A. The first time.

Q. At the time he came there did you have any other information about this case?

A. Not at all.

Q. Will you please tell the Court and jury what you did when he got there?

The Court: What was the date?

Q. Do you know what date he came to see you?

A. About February 3rd or 4th.

By the Court:

Q. February what?

A. February 3rd or 4th.

By Mr. Crawford:

Q. Did you take any statements on that day that would refresh your recollection as to the date when he came?

A. Yes, sir.

Q. I show you this statement and ask you to look at it and see if it refreshes your recollection as to the exact date?

A. March 5th.

Q. March 5th?

A. Yes, I was confused.

Q. What happened when Redman came to see you in your office, Mr. Suessmuth?

A. What is that?

Q. What happened? What did you do?

A. The man came in and said he wanted to bring a claim against this vessel and I said the usual practice is that we [fol. 206] take a statement from the claimants when they come in.

Q. Did you take his statement at that time?

A. Yes, sir. I dictated the statement to a stenographer.

Q. To a stenographer?
A. Yes, sir.

The Court: What is your occupation?
The Witness: Adjuster.
The Court: You are not a lawyer?
The Witness: No, sir.

Q. Did you ask Redman to tell you what his claim was?
A. Yes, sir.
Q. And is that what you dictated to the stenographer?
A. Word for word.
Q. And is this the statement the stenographer produced after you had dictated it, as you testified?
A. That is the statement.
Q. Did you ask Redman to read this statement over?
A. Yes, sir.
Q. Did he do so?
A. Yes, sir.

Mr. Graves: I object to that as incompetent.
The Court: Did he read it.

By the Court:

Q. You saw him read it?
A. Yes, sir.
Q. How long did it take him to read it?
A. I couldn't say in so many minutes; quite a while.

By Mr. Crawford:

Q. And Mr. Redman testified that he signed both pages of this statement. Did he sign both of those statements be-
[fol. 207] fore or after he read the statements?
A. After he read it.

The Court: Did you see him sign them?
The Witness: Yes, sir.

Q. He signed them in your presence?
A. Yes, sir.
Q. At your desk?
A. Yes, sir.
Q. After this statement was signed by Redman did you have him swear to it before a notary?
A. Yes, sir.

Q. And where is that notary?

A. In the same room; about 10—15 feet away from my desk.

Q. Is he present in court?

A. Yes, sir.

Q. And were you present when he swore to this document?

A. Yes, sir.

Mr. Crawford: That is all.

Cross-examination.

By Mr. Graves;

Q. Your business is claim adjuster, is it not?

A. Adjuster.

Mr. Crawford: Just a minute, I made reference to a document, referring to Defendant's Exhibit B. I would like to ask a few more questions.

By Mr. Crawford:

Q. After this statement, Defendant's Exhibit B, was signed, did you take any further statement that day from Redman?

A. Yes, sir.

Q. And was that after a consultation with your superior?

A. Yes, sir.

[fol. 208] Q. I show you a paper, Defendant's Exhibit C, and ask you if that is in your handwriting; all three pages?

A. That is in my handwriting with the exception of the signature and the subscription by the notary public.

Q. Did you write this down when Redman was present there?

A. Yes, sir.

Q. And what did you write down on this statement?

A. Why, about the same as was on the other statement. The first paragraph was a little different.

Mr. Graves: I object; the statement speaks for itself.

Mr. Crawford: Of course, it does, Mr. Graves. I agree with you. I agree with you perfectly.

Q. What information did you write down in this statement? Where did you get it?

A. From the claimant.

Q. And you had no other knowledge of the case except what he told you?

A. That is all.

Q. After you wrote this down in your own handwriting, did you ask Redman to read it?

A. Yes, sir.

Q. And did he read it in your presence?

A. Yes, sir.

Q. And after he read it, did he sign it?

A. Yes, sir.

Q. After he signed it did you get a notary public there?

A. Yes, sir, I took him in to the notary public.

Q. Was it the same notary public you had used on the other statement?

A. No, sir.

Q. Are both of those notaries in court?

A. Yes, sir.

[fol. 209] Q. And did Redman swear to that statement before a notary?

A. Yes, sir.

Mr. Crawford: You may cross examine.

Cross-examination.

By Mr. Graves:

Q. You say you are an adjuster; that is your business. Do you talk to people that have claims and investigate cases?

A. Yes, sir.

Q. And, of course, it is your object to get the best settlement possible for your company, is that right?

A. No, sir.

Q. What is that?

A. No, sir.

The Court: Do you work for a company?

The Witness: Yes, sir.

The Court: What is the name of the company?

The Witness: U. S. P. & I.

The Court: And you do not try to get the best possible settlement in the case?

The Witness: I don't know whether you mean whether I try to.

Mr. Graves: For your client did you try to do the best—did you try to do the best for your client that you can in every case that you handle?

The Witness: Absolutely.

Q. And in some cases you settle cases pretty fast, don't you?

Mr. Crawford: I object to the form of the question as calling for a conclusion; utterly improper.

[fol. 210] The Court: Read the question.

(Question read.)

The Court: Sustained.

Q. Do you not frequently go to hospitals when men have been injured, practically before the bed is warm and try to get statements from them as to their accident?

Mr. Crawford: I object to it as highly improper.

The Court: Objection sustained.

Q. Do you know a man by the name of John Goldin?

Mr. Crawford: I object as incompetent, irrelevant and immaterial.

The Court: I will allow the question; whether he knows a man. Do you know a man by that name?

The Witness: John Goldin? I don't recall him.

Q. You went to court on a case with John Goldin, didn't you?

Mr. Crawford: I object as incompetent, irrelevant and immaterial.

The Court: I will allow it and give you an exception.

Mr. Crawford: Exception.

Q. Only last year over in Staten Island?

A. I remember to going to court on some case; I don't remember the case.

Q. Do you remember John Goldin? Didn't you testify in that case?

[fol. 211] Mr. Crawford: I object, if the Court pleases, whether this man testified in one or twenty cases; it has no bearing here.

The Court: Are you going to connect him up with this case in some way?

Mr. Graves: I am going to connect John Goldin up. I am going to show that this man——

Mr. Crawford: Just a moment, do not make a statement now.

Mr. Graves: You are asking me.

Mr. Crawford: I am not. I am asking if you are going to connect this man with the case. If not, it is improper testimony.

The Court: Do you know a man by that name?

The Witness: I recall the name, yes, but I don't know him.

Q. You don't know him?

A. By that I mean if I saw the man here I wouldn't know him.

Q. You saw him in court for two days last year in Staten Island?

Mr. Crawford: I object to the question. If your Honor please, it is highly incompetent.

The Court: Is he in court?

Mr. Graves: No.

Q. If I describe him as a man with three fingers off his hand, will that help your memory?

Mr. Crawford: I object as incompetent.

A. I don't remember.

Q. You wouldn't remember a man by that description even?

A. No, sir.

[fol. 212] Q. Do you remember seeing that man in the Cumberland Hospital?

Mr. Crawford: I object, if the Court pleases, it is incompetent, irrelevant and immaterial.

The Court: I will sustain the objection.

Q. In October, 1930?

Mr. Crawford: The objection was sustained.

Q. As a matter of fact, you go to hospitals every day, practically, don't you?

Mr. Crawford: I object as incompetent, irrelevant and immaterial.

Mr. Graves: That is perfectly proper. It is perfectly proper to show the character of his work as an adjuster.

The Court: The character of work is not involved. He may have done good work or bad work in every case. The question is what does he know about this plaintiff; that is the point. We are trying this case. We are not trying his practice.

Mr. Graves: Can I not show, your Honor, what his work is and what he does?

The Court: No, it makes no difference what he does or what he ever did in his life. The question is what does he know about this case. He is not on trial; he is just a witness. He testifies to the facts that are relevant in this case.

Mr. Graves: Just for the purpose of showing his interest, your Honor.

[fol. 213] The Court: Pardon me?

Mr. Graves: Just to show his interest in the case.

The Court: If you show that he is interested in the result, go to it; but, what Mr. Goldin has got to do with it, I don't know.

Mr. Graves: I will leave him out.

Q. You interview men as soon as accidents happen, don't you?

Mr. Crawford: I object to it as incompetent, irrelevant and immaterial.

The Court: How does he know? Are you there when they happen?

The Witness: No, sir.

Q. As soon as you hear about them?

A. No, sir.

Q. Don't you go every day to the hospitals, in the afternoon?

Mr. Crawford: I object to it, if your Honor please, as highly irrelevant and prejudicial.

The Court: Suppose he did. The question is did this man Redman tell him what happened. Tell me what contradictory statements he made.

Q. You say that Redman came to you about a claim, is that right?

A. That is right.

Q. And you had never heard anything about that case before?

A. No, sir.

Q. I show you Defendant's Exhibit A and ask you whether you had not sent that letter at the time that Goldin [fol. 214] came to you on March 4th, 1931?

A. Who came?

Q. Redman?

A. I can't read the date on that. There is a hole right through it. There is a date on it, but it is punched right through the figure.

The Court: Do you remember whether you saw that before you saw Redman? Is that what you want to know?

Mr. Graves: Yes.

The Court: Did you see that before you saw Redman?

The Witness: No, sir.

The Court: Do you know on what day you saw Redman?

The Witness: No, sir.

The Court: Do you know on what day you saw Redman?

The Witness: March 5th, the date the statement was taken.

Q. Who turned it over to you?

A. My immediate superior.

Q. Did you have any file on the case?

A. Not that I recall.

Q. Have you got charge of the case? You have got charge of the case, haven't you, for the facts?

The Court: Did you get any record?

The Witness: He had no record on file. I had no record on file when the man came in.

Q. You had charge of the case up to the time it was turned over to the attorney, is that true?

A. No.

Q. Well, it was in your department?

A. I have no department. I am a subordinate.

Q. You were assigned to investigate this case?

A. No, sir.

[fol. 215] Q. Just to interview this plaintiff on this one occasion?

A. That is all I did.

The Court: Is that the only thing you were on; this one case?

The Witness: I saw him after that one time, one time after.

The Court: When was that?

Q. He came to you and told you he had an accident, is that right?

A. No, sir.

Q. Well, he came to you and made a claim, didn't he?

A. Made a claim.

Q. Did you explain his rights to him?

A. I told him we would take the information down on paper; that is all I said to him.

Q. Did you tell him what his rights were?

A. No.

Q. Did you explain the law to him?

A. No, sir.

Q. Did you tell him what he had to show to entitle him to a claim?

A. No, sir.

Q. You didn't care about that?

A. No, sir.

Q. You knew he was an ignorant man at the time, didn't you?

A. No, sir.

Mr. Crawford: I object to it as incompetent, irrelevant and immaterial.

Q. You didn't know that? You are familiar with the law covering seamen's cases, having worked as an adjuster in those cases?

A. To some extent.

Q. And this man came to you with a case and you never told him anything about his rights?

Mr. Crawford: Objected to as incompetent, irrelevant and immaterial. There is no reason why he should have told him.

[fol. 216] Q. You told him you would consider his claim, did you not?

A. No. What was the question?

Q. Why did you say no?

A. I didn't understand whether you said did not or did.

Mr. Graves: Will you please repeat the question?

(Question repeated.)

A. Yes.

Q. And you say you knew he wanted to make a claim, didn't you; is that right?

A. Well, that was evidenced by his appearing in the office.

Q. And you talked to him, did you not?

A. I talked to him for the statement. That is the way the statement was taken.

Q. You had a conversation with him?

A. On the statement.

Q. Did you tell him "You have no case at all"?

A. No, sir.

Q. You didn't tell him that?

A. No, sir.

Q. You simply asked him to sign a statement?

A. I asked him to give me the information.

Q. Did you promise him anything?

A. No, sir.

Q. Did you promise to take the case up with the company and see what you could do for him?

A. That is done in every case.

Q. You did give him some encouragement?

A. In writing the claim.

Q. You told him you would see what could be done; you told him that, didn't you?

A. No, sir.

Q. You told him you would take it up with the company and see?

A. Regarding investigation.

[fol. 217] Q. You did submit the matter to the company—you told him you would submit the matter to the company if he would sign a statement for you?

A. No.

Mr. Crawford: I object, if your Honor please. This has gone far enough.

The Court: Read the question.

(Question read.)

Mr. Crawford: Objection withdrawn.

Q. Answer the question, please?

A. I answered it.

The Court: He said "no".

Q. You did not tell him you would take it up with the company?

A. I said, I told him I would take it up.

Q. That you did?

A. Regarding the investigation.

Q. You would look into the whole matter?

A. Yes.

Q. There was something to look into, wasn't there?

A. There is on every claim.

Q. According to these facts that you have put there, there is no case to put in there?

Mr. Crawford: I object as calling for a conclusion; as to whether this given state of facts is a cause of action or not. That certainly is a legal conclusion.

The Court: Ask him for a fact, not for his opinion.

Q. In your opinion, is any cause of action stated in these two exhibits?

[fol. 218] Mr. Crawford: I object, if the Court please. This man is not a lawyer.

The Court: A physician expresses an expert opinion. He is not an expert. You can examine him as to facts, not as to the operation of his mind. I tried to show you why I sustained the objection. I am very sure it is not competent. You may take an exception.

Mr. Graves: I respectfully except.

Q. At any rate, you told him you would look into the matter, did you not, providing he would sign some papers for you, is that so?

Mr. Crawford: I object, if the Court please. There is no testimony to that effect at all. He has been through this three times.

Mr. Graves: I have a right to cross examine.

Mr. Crawford: I have a right to object.

Mr. Graves: What is the objection?

Mr. Crawford: I made it.

The Court: Read the question.

(Question read.)

Q. Is that so?

A. A part of that is right, but the other part about providing he would sign a statement is not right.

Q. At the same time you told him he would have to sign some papers, didn't you?

A. I told him he did not have to sign anything.

Q. You told him that? Didn't you ask him to sign those papers? Didn't you ask him to sign those papers?

A. After he gave us a statement, yes.

[fol. 219] Q. You asked him to sign it?

A. But he did not have to sign it.

Q. Didn't you tell him he would have to sign it as a condition precedent to taking it up?

A. No.

Q. He just gladly signed that paper for you?

A. The man was asked to read the statement. He read the statement. Then he was taken to a notary public, as I explained before. The notary public asked him whether he would sign it and whether it was correct.

Q. The notary public was some distance away, wasn't he?

A. From myself to Mr. Crawford (indicating), and no further.

Q. 15 feet away?

A. About that.

Q. At that time you say he read it. He simply walked over to the notary?

A. That is right.

Q. He just simply put his name on it and Redman put his name on it; yes or no?

A. And put his seal.

Q. Just walked over there and the notary put his seal on it. Before that he had read it by you?

A. Yes, sir, and signed.

Q. And everything after that was simply the affixing of the seal? Over there it was not reread?

A. The notary asked him whether he had read it.

Q. You remember all that?

A. I was there when it was done.

Q. What was the object of taking two statements?

A. The first one, the typewritten one, was presented to my superior and he read it over with me and we conferred on it and one or two little things were missing in detail. He said, "Get an accurate statement and include that information."

[fol. 220] Q. And so the typewritten one was prepared first, is that right?

A. You mean it was dictated?

Q. Dictated first?

A. Yes.

Q. And then the one that you wrote in your own handwriting was second, is that right?

A. That was the additional statement.

Q. Secondly?

A. That is right.

Q. As a matter of fact, isn't there more material in that first one than there is in the second?

A. It is in more detail, yes.

Q. And yet you say that your boss asked you to get more detail and then wrote out this one in longhand?

A. Yes, sir.

Q. Although the first had more detail in it than the second, is that right?

A. That is right. It didn't include——

Q. This first statement had more detail than the second?

A. That is right.

Q. But your boss told you the first did not have enough detail and asked you to write the second and therefore you went ahead and had it signed?

A. That is right.

Q. Although your boss said the first one did not have enough detail?

A. That is right.

Q. He signed some other papers for you, didn't he?

A. Not on that day.

Q. Didn't he sign it—didn't he sign a hospital request?

A. Not on that day. Later on he did.

Q. He came back, didn't he?

A. No, I went to see him.

Q. What did you go to see him for?

A. On the strength of that letter he wrote in.

Q. The letter was written before these two statements, weren't they?

Mr. Crawford: The letter shows on its face, Mr. Graves.

[fol. 221] The Court: Was that letter written before or after?

The Witness: From what I can see on that letter—it is dated March 12th.

The Court: That is what I see. Take a look at the letter. What is the date of the statement?

The Witness: March 5th.

Q. You say the date is punched out?

A. Well, you can see the top and bottom of the number.

Q. The punching out was done in your office, wasn't it? You went to see him about his claim, didn't you, is that right?

A. Yes, sir.

Q. About settling his claim, is that right?

A. No, sir.

Q. What did you go to see him for?

A. About getting the report from the hospital; his clinical record.

Q. When did you get that?

A. The same day I called on him.

Q. After March 19th?

A. I don't recall the day, I don't remember, in other words.

Q. Was it after you received that letter?

A. Yes.

Q. You got that letter, the letter dated March 19th, is that correct?

A. It looks like a 2 to me. I can't make it out.

Q. Then it is February 19th, isn't it, if it is a 2?

A. That is what I make of it.

Q. You say you went to get the hospital record for him after getting that letter of March 12, is that right?

A. I won't swear to dates.

Q. Didn't you just swear to it?

A. No, I said I called on him after I got that letter.

Q. For the purpose of getting a hospital report; you said that, did you not?

A. Yes, sir.

[fol. 222] Q. I will ask you whether or not, as a matter of fact, this hospital record was not granted to you on March 5th, 1931? Look at the hospital report.

A. What was that question there?

Q. It was issued on March 5th, wasn't it?

A. That is right.

Q. So therefore you must have had some more papers signed on March 4th when he signed those papers?

Mr. Crawford: I object. There is no testimony any papers were signed on March 4th in the case.

Q. So you didn't go to see him to get any hospital record because you already had it?

A. We had no request to get it.

Q. You got the record on March 5th, didn't you?

A. According to that.

Q. And yet you say you went there after getting that letter, dated March 12, for the purpose of getting him to sign a request for the purpose of getting the record?

A. I didn't say what date.

Q. You said after getting the letter, and the letter is dated March 12th, and you said you can't get a copy of the record without a written consent by letter and the letter has to be notarized?

A. Yes.

Q. Who was the notary?

A. A man over on Hamilton Avenue.

Q. Is he in court?

A. No.

Q. You went out and got it?

A. Yes, sir.

Q. You wrote him a letter to call and come to see you after that, didn't you?

A. There was some correspondence about the matters being investigated.

[fol. 223] Q. You had him back in the office? You wrote for him to call?

A. I don't remember seeing him.

Q. You won't say that you did not?

A. I don't remember.

Q. You say you don't remember at all?

A. No, sir.

Q. Don't you remember the final disposition of the claim?

A. No, sir.

Q. You remember nothing about that?

A. No.

Mr. Graves: That is all.

WILLIAM M. HUDSON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Crawford:

Q. Captain Hudson, were you in the same office as Mr. Suessmuth on March 5th, 1931?

A. I was.

Q. And were you a notary public at that time?

A. I was.

Q. Have you any individual recollection of the plaintiff in this case, Mr. Redman?

A. No, sir.

Q. You don't remember him at all?

A. No, sir.

Q. As a notary public you take the oaths of a good many people, do you not, or did you not at that time?

A. A good many, yes, sir.

Q. I show you this paper, Defendant's Exhibit B, and ask you if that is your signature appearing thereon?

A. Yes, sir.

Q. And does that refresh your recollection of the day or of the taking of an oath of a man named Redman on this day, March 5th?

A. No, sir.

[fol. 224] Q. You have no recollection on the subject?

A. No, sir.

Q. Will you state what your practice was in taking the oaths of people in that office to statements at that time?

A. When a man comes to my desk or is brought there by anybody I first see whether it is signed or not. If it is signed by John Smith, I say, "Are you John Smith?" If he says "Yes", I say, "Have you read this statement?" If he says "No", I hand it to him and I say "Read it." I say "I cannot swear you in until you read it." If he says "Yes, he has read it", then I say, "Did you sign this?" If he says "Yes" then I say, "Do you solemnly swear the contents in this statement is true, to the best of your knowledge and belief?" And if he says, "Yes" then I notarize it.

Q. And that is what you did in this case?

A. In all cases the same.

Mr. Crawford: That is all.

Cross-examination.

By Mr. Graves:

Q. You are compelled by law to do that, aren't you, Captain?

A. Sir?

Q. You are compelled by law to do that?

A. Compelled by law to do what?

Q. To do these things you have just enumerated?

A. It is the ordinary way of notarizing.

Q. So you did the customary thing?

A. Yes.

[fol. 225] Wesley H. Morris, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Crawford:

Q. Mr. Morris, were you in the same office as Mr. Suessmuth on March 5th, 1931?

A. When you say the same office——

Q. I don't mean the same room.

A. No, in the same concern; yes.

Q. And were you a notary public at that time?

A. I was, sir.

Q. Do you recall the plaintiff in this case, Donald Redman, from his appearance at all?

A. Not individually, no.

Q. I show you Defendant's Exhibit C and ask you if that is your signature appearing at the bottom of the third page?

A. It is.

Q. Does that refresh your recollection that you took an oath to this statement at that time?

A. I took the oath, yes.

Q. What is your practice in connection with asking witnesses before taking their oaths?

A. When they come before me I always ask them, "Do you swear that this is your signature?" If they answer, "Yes," I say, "Do you know what you are signing?" And

if they say, "Yes," it is all right. Then I take the oath. If not, I make them read it or read it to them.

Q. Are these words in your handwriting at the bottom of this third page "Subscribed and sworn to before me this 5th day of March, 1931"?

A. They are, sir.

Q. And you know that you did that individually?

A. Yes, sir.

[fol. 226] Cross-examination.

By Mr. Graves:

Q. You don't have any actual recollection of doing that, do you?

A. The mere fact that that subscription is at the bottom.

Q. Please answer the question. This calls for a yes or no answer.

The Court: Have you any recollection of having seen Redman, any independent recollection of having seen Redman on that day?

The Witness: I know that I saw him by having taken his oath.

The Court: You will swear now that you saw him?

The Witness: Yes.

Q. The reason is because you see your name at the bottom of that paper?

A. I wouldn't put my name on the paper unless I saw the man that signed it.

Q. That is your reason?

A. Yes.

Q. Where was Mr. Suessmuth's desk on that day?

A. Just outside my office.

Q. At that time were you at 45 Broadway?

A. 45 Broadway.

Q. 45 Broadway?

A. Yes, sir.

Q. And did Mr. Suessmuth have a private room?

A. No, it was not private.

Q. Well, he was over by himself, was he?

A. He had a desk by himself, yes.

Q. And where was your desk with reference to his?

A. In another little room.

Q. Another little room?

A. Yes, I am the auditor.

[fol. 227] Q. How far was your desk from Mr. Suessmuth's desk?

A. 25 feet, I would say.

Q. Where was Captain Hudson's desk?

A. Nearer.

Q. Nearer to him?

A. Nearer Mr. Suessmuth.

Q. And do you remember what time of the day—of course, you don't recall the time of the day this was done?

A. No.

Q. Can you give us any reason at all why Mr. Suessmuth should have gone to you for one affidavit instead of to Captain Hudson?

A. Captain Hudson had a practice of being out at different times.

Q. At different times?

A. Yes, sir.

Q. As a matter of fact, do you remember that he was there at all at the time that the affidavit was taken?

A. No; if he is there I never sign it.

Q. Do you have two notaries in at the same time?

A. Exactly.

Q. These two were signed at the same time?

A. Not that I remember.

Q. You heard Mr. Suessmuth testify and say they were drawn within a very short time of each other?

A. Captain Hudson may have signed his and gone immediately out. He was coming and going—that is his job.

Q. He was investigating too, wasn't he?

A. Partially.

Mr. Graves: That is all.

A Juror: Wait a minute. Can you call Mr. Suessmuth to the stand?

[fol. 228] ALFRED O. SUESSMUTH, recalled.

Mr. Crawford: Have you a question, Mr. Foreman?

The Foreman of the Jury: Mr. Suessmuth, if the hospital records stated that you were over to the hospital on March 4th, is that right?

The Witness: That is right.

The Foreman: Then you knew something about the case on March 5th, when the young man went there to make his report to you, did you?

The Witness: Well, if the request was dated on the 5th, it is most likely I went over there on the 5th.

The Foreman: Then you knew something in regard to the case on March 5th when he made his report to you or stated it?

The Witness: Yes, I was sent over to get the clinical record.

The Foreman: That is all.

Mr. Graves: One moment; I have a couple of questions.

By Mr. Graves:

Q. Both these notaries here were in the employ of your company, weren't they?

A. They were.

Q. Of the same concern you worked for?

A. That is right.

By Mr. Crawford:

Q. You testified from an authorization of transcript of record of the hospital that you had seen this file on March 5th, is that correct? I show you the transcript and ask [fol. 229] you if that is the date on it?

A. You mean the file or just this report?

Q. You looked at that when Mr. Graves was examining you and you said if that is right that is the time you were there, and that date is March 5th, is it not?

A. That is right.

Q. Inasmuch as there seems to be some confusion about this I would like to know if that is correct?

A. March 5th is the date.

Mr. Crawford: Inasmuch as there seems to be some confusion about this I would like to offer this paper in evidence.

Mr. Graves: There is no objection at all. If you want to, you can offer the whole book in evidence.

Mr. Crawford: Let us have it in.

Mr. Graves: You objected up to this time.

The Court: Just address the Court and not one another.

(Received and marked Defendant's Exhibit D in evidence.)

Mr. Crawford: That is all, Mr. Suessmuth.

(Excerpt from Defendant's Exhibit D read to the jury.)

The Court: We will take a recess until two-fifteen.

(After recess.)

Mr. Crawford: If your Honor please, I have a deposition to read. I will ask my assistant to take the stand and read the answers. This is a deposition taken before trial, with [fol. 230] both counsel present in Baltimore. It is a deposition of George Ramsey, taken before Virginia Marquiss, a Notary Public of the State of Maryland, in and for Baltimore City, at the offices of the Bull Line, Pier 5, Pratt Street, Baltimore, Maryland, on the 28th day of January, 1933, at ten o'clock A. M., pursuant to the attached notice (reading):

"It is stipulated by and between counsel for the respective parties that the signing, sealing and certification of this deposition shall be waived; that the cost of the original and two carbon copies shall be taxable; it is further stipulated that all objections are reserved to the trial, except as to the form of question and answer, which will be waived unless raised on the record.

"George Ramsey (colored), a witness of lawful age, produced on behalf of the defendants, having been duly sworn, testified as follows:

"Direct examination.

"By Mr. Meagher:

"Q. Where do you live?
"A. 6 Hanover Street, Charleston, South Carolina.
"Q. Mr. Ramsey, how long have you been going to sea?
"A. Fifteen years.
"Q. During that time what jobs have you held on vessels?
"A. Mess man, cook and steward.
"Q. Are you working for the A. H. Bull Steamship Company at the present time?
"A. No, sir."

Mr. Crawford: Then skipping four or five questions:

Mr. Graves: Can we have them all read?

[fol. 231] Mr. Crawford: There are a lot of things here, Mr. Graves, that do not mean a thing. If you would like to read it, all right.

"Q. How long have you been working for the Bull Line, off and on?

"A. Five years.

"Q. What ships connected with the Bull Line have you been working on?

"A. I have been working on the 'Nancy'. The 'Nancy' was the Weems Line. Before the Bull Line took the Weems Line over I was working for the Weems Line, and then after that I still worked for the Bull Line on the same ship, the 'Nancy Weems', which was the same one I was on."

Mr. Crawford: Down in the middle of page 4:

"Q. On February 13, 1930, were you one of the crew of the 'Frances Weems'?

"A. Yes.

"Q. What job did you hold then?

"A. Steward.

"Q. Do you remember where the 'Frances Weems' was on February 13, 1930?

"A. Well, if I am not mistaken, I think the afternoon of the 13th we arrived in Brooklyn, Pier 27."

Mr. Crawford: Skipping to page 5—I will skip page 5, 6 and 7 and 8, also page 9. At the bottom of page 10:

"Q. While you were in New York the ship loaded some stores, did it not?

"A. Yes.

"Q. Do you recall what day those stores were loaded?

"A. I could not recall exactly what day, whether it was the 13th or 14th. I do not know.

"Q. But it was either one of those two days?

"A. But it was either one of those two days, because we sailed the 15th.

[fol. 232] "Q. How were those stores loaded aboard?

"A. The deck department took them aboard and we took them from the deck department and we stored them in the various places they should be stored.

"Q. How did the deck department take them aboard?

"A. With the 'wench', they took them up with a steam wench.

"Q. With a winch and sling?

"A. Yes.

"Q. What did you do with the stores?

"A. When they were landed on deck we go and get them and put them some place they were supposed to go.

"Q. Did they come over in boxes and bags?

"A. Some of them come in boxes and some of them come in bags, burlap.

"Q. What would you do with the boxes when they were taken out of the sling?

"A. Well, when we got the boxes out of the sling, we sometimes break them open, some of the boxes, and put the stuff in the icebox, and some boxes, we put them right in the icebox, and the rest of the broken boxes we usually pile them in a corner on one side until the ship gets outside.

"Q. And then what would be done with them when the ship got outside?

"A. They would be throwed overboard.

"Q. Do you recall who, in the storage department, did that work on this particular occasion?

"A. Well, I know for sure I had to be one of them, and the mess men, me and the mess men, that is, only the two mess men and myself.

"Q. Was the cook engaged in that work?

"A. I could not say definitely whether he was or not, because most of the time he would be busy getting meals ready, and I would just take the boys and go in there and [fol. 233] put the stores away. I would not hardly bother him.

"Q. Do you recall the evening of February 14, 1930, the night before you sailed?

"A. Yes.

"Q. Did you go ashore that night?

"A. Yes.

"Q. Alone?

"A. No, sir, I and Redman went together."

Mr. Crawford: Skipping about four questions:

"Q. Do you recall about what time you left the vessel?

"A. No, I could not say exactly what time.

"Q. Well, you had dinner aboard, didn't you?

"A. Yes.

"Q. What time did you have dinner?

"A. Dinner ran from five to six.

"Q. Are you referring to your dinner?

"A. No, that was the ship's crew dinner. Everybody has dinner, say, at five o'clock, and it runs from five to six. It may be later, but the usual time was one hour."

Mr. Crawford: Skipping the next three questions about dinner time:

"Q. Do you know whether or not Redman had had his dinner aboard?

"A. No.

"Q. Now, where did you and he go to when you left the ship?

"A. Well, we went uptown to the barber shop.

"Q. How did you go to the barber shop?

"A. We walked.

"Q. And what did you do then?

"A. Got a haircut and a shave.

"Q. Was Redman with you in the barber shop?

"A. Yes.

[fol. 234] "Q. And from there where did you go?

"A. From there we come on back down the street where he said some people he used to room with lived.

"Q. You went directly there from the barber shop?

"A. Yes.

"Q. You are sure about that?

"A. As far as I can remember, we went right direct from the barber shop to these people that he said where they lived. I do not know where it is, because I do not know Brooklyn.

"Q. Now, from the time you left the barber shop until the time you went to this place that you have mentioned, did you make any other stops in any other stores or places along the line?

"A. Well, no.

"Q. You are sure of that?

"A. I don't remember. I don't remember stopping any—I believe we did go to a drug store. We went there and the place that he stopped.

"Q. How did you go from the barber shop to the drug store?

"A. We walked.

"Q. What did you do in the drug store?

"A. We went to the cigar store first and got some cigarettes.

"Q. You went from the barber shop to a cigar store?

"A. Yes."

Mr. Crawford: Skipping a question:

"Q. How did you go to the cigar store from the barber shop?

"A. Walked. We walked from the barber shop to the cigar store."

Mr. Crawford: Skipping to the middle of the next page:

"Q. Well, from the cigar store you say you went to a drug store?

"A. Yes.

[fol. 235] "Q. And you walked?

"A. Yes.

"Q. About how far was the drug store from the cigar store?

"A. It wasn't far. It wasn't too far away."

Mr. Crawford: The top of page 18:

"Q. What did you do in the drug store?

"A. We bought some soap, toilet articles, and some tooth paste and shaving cream, and stuff like that, and he bought some pills, I think.

"Q. Redman, you mean?

"A. Yes.

"Q. Do you know what kind of pills they were?

"A. No.

"Q. Didn't he tell you what kind they were?

"A. No, he just said he will get some pills, that is all, that we will take along on the trip, but what kind it was I do not know.

"Q. Did he say what they were for?

"A. No, sir.

"Q. From the drug store, where did you go?

"A. From the drug store then we goes to this place he roomed at some time before.

"Q. About how far was that from the drug store?

"A. I do not know.

"Q. Do you remember how long it took you to go from the drug store to the house you mentioned?

"A. No, I do not remember how long it took.

"Q. Where was this house, do you know?

"A. No, I don't know, because I do not know Brooklyn. I was just along with him, that is all.

"Q. Well, what did you do there when you arrived at the house?

"A. Well, he rung the door bell several times and he got no response, so we went away and went back to the drug store."

Mr. Crawford: Skipping two or three questions:

[fol. 236] "Q. Did you ride or walk?

"A. No, we didn't ride; we walked.

"Q. Well, then, what happened after you got no answer to the bell?

"A. Well, then, we goes back to the barber shop.

"Q. How did you go there?

"A. We walked, and he asked the barber if he knew where these people lived, and he told him yes, that they lived somewhere on Myrtle Avenue, but he did not know the address. He said it was somewhere between some block and another, but I do not know where it was at.

"Q. Well, then, what happened?

"A. Then we left there and we went—I went to a lunch room. I said, 'Let us go have a little lunch.' So he wanted me to go with him on Myrtle Avenue to these people's house. Of course, he did not know where it was at himself. So I said, 'Let us go to the lunch room and have some lunch.' We goes in the lunch room. Of course, he didn't go inside. On our way to the lunch room he wanted me to go to Myrtle Avenue with him. I told him had he known where these people lived I would go, but to walk all over Myrtle Avenue and find somebody he did not know where they lived. I wasn't going. So when I went in the lunch room he stood outside for a while and then he said, 'I am going,' and he left me, and after I got through having lunch I asked the lunchroom keep- the way to go down to the ship, because I did not know Brooklyn. So he showed me the street car line and he said, 'Catch a car going that way, east.'

"Q. And you took a car and went back to the ship?

"A. Yes."

Mr. Crawford: Skip three or four questions:

[fol. 237] "Q. About what time was it, do you recall approximately, as nearly as you can, when Redman left you that night?

"A. It was around midnight. I couldn't tell you what time it was. I do not know whether it was a little before twelve or after twelve, but I am sure it was around midnight.

"Q. Can you tell us about, after you had left the ship, how long it was you and Redman had been together?

"A. Well, I do not know what time we left the ship, but I know from the time we left the ship to the time he left me, we were together all that time, but how long it was I do not know.

"Q. Do you know about how long that was?

"A. I couldn't exactly say because I didn't take no time of when we left the ship, and I do not know what time he left me, but I figure it was around midnight.

"Q. But you cannot tell us whether you were together one hour or two hours or three hours?

"A. Oh, I know we were together more than one hour, but just exactly how many hours I do not know."

Mr. Crawford: Skip a question:

"Q. We do not need exactly how long, but about how long?

"A. I do not know. I couldn't say exactly. I could not tell. Maybe three hours and maybe more or maybe less. I do not know.

"Q. Did Redman say anything to you when he left about meeting you again?

A. Not that night. He said that he would be down early in the morning.

"Q. Down where?

"A. Down on the ship.

"Q. And did you meet him the following morning?

"A. No, he didn't show up.

[fol. 238] "Q. Did you see him the following morning?

"A. No, I didn't see him no more from then until now.

"Q. You haven't seen him since then?

"A. No.

"Q. Well, he had some belongings aboard, didn't he?

"A. Yes.

"Q. And didn't he come down for those?

"A. Not up to the time we left the dock, because I took his belongings up to the Port Captain's office and left it there for him. He was not down as long as we were to the dock. He might have come down afterwards. I do not know.

"Q. What did you do, sail out without a cook?

"A. I waited until—I kept his job open until around two o'clock—no, we sailed at two, or a little after two—I kept the job open until around 1:30, and Mr. Bond was shipping master, and I told him to have a man handy in case he did not show up, so then this man would be right there to take his place, you see, and I kept the job open until one o'clock, until 1:30. He was all right and I did not want to lose him, but it happened so he never showed up, so I had to put this man to work. He never did show up.

"Q. Do you know why he didn't show up?

"A. No, sir, I do not know. I ain't never seen him from then until now.

"Q. Did he send any word down to you by any messenger as to why he didn't show up?

"A. No, no, no.

"Q. Now, that night of February 14th, while you were with him, did you have anything intoxicating to drink?

"A. No, not that I know of, he didn't, not as I know of, because I don't drink. I do not know whether he did, but he didn't have nothing to my knowledge.

[fol. 239] "Q. You are sure about that, are you?

"A. Not as I know of. When we were together, he did not seem like he had any whisky.

"Q. During the time you were with him that night, did he make any complaint to you about how he felt?

"A. No.

"Q. Did he say anything to you about his foot hurting him?

"A. No, not that I remember, he didn't say nothing about his feet.

"Q. Did you notice anything about his feet while you were walking around with him?

"A. No, sir.

"Q. About how long would you say he was under you as a cook on board the 'Frances Weems', altogether?

"A. I couldn't exactly say. I know I hired him here and we went to Charleston, Jacksonville, Miami and Boca Grande and came back to Alexandria, and then from Alexandria we go to New York. Now, how many days it is, I couldn't tell you.

"Q. During that time, did Redman ever complain to you about being hurt?

"A. No, sir.

"Q. About being sick?

"A. No, sir.

"Q. About having anything wrong with his foot?

"A. Not during that time. I did not notice anything. I did not hear him say anything about his foot.

"Q. Well, did you ever hear aboard the ship from any one else, other than Redman, that he had hurt his foot?

"A. No, sir, not to my knowledge, I never heard nobody say anything about Redman being hurt, as far as I can remember.

"Q. And you are sure, are you, that he said nothing to you that night?

"A. No, I am most sure he didn't say nothing to me that night, as far as his feet is concerned.

"Q. And about not feeling well?

"A. No, sir.

"Q. As far as you could tell, did he have any difficulty [fol. 240] in walking around with you that night?

"A. No, sir. I didn't detect no difficulty in his walk that night.

"Q. I want you to be sure of that, Ramsey, because it is important. I want you to tell the truth.

"A. I am telling the truth just as much as I know it. I do not remember Redman said anything to me concerning his feet or any other allment, not that night we were up the street. I don't remember such a thing.

"Q. Did you go ashore the night of February 13th?

"A. No.

"Q. Do you know whether or not Redman went ashore that night?

"A. I do not know, but I did not go ashore?"

Mr. Crawford: Skipping the next page—the bottom of page 29:

"Q. Now, when stores were taken aboard, on what deck were they placed?

"A. Well, the dry stores, they were placed on the upper deck.

"Q. On the upper deck?

"A. That is in the dry store room, and then the perishable food, why that goes down in the icebox.

"Q. Would that be landed on the well-deck?

"A. Yes.

"Q. While you were in New York on this occasion, did you notice any empty or broken boxes around either the well deck or the upper deck?

"A. Well, when the stores land on the well-deck, you see, and sometimes you break the boxes open, the meat and stuff, they never go up on the upper deck, they stay on the well-deck because the icebox is down there, and when you break the boxes open you take what the box contains and put it in the icebox, and those broken boxes are being [fol. 241] thrown in a corner. Here (indicating) is the icebox, and right up here (indicating) is the corner of the ship from the icebox, and those boxes are thrown in that corner.

"Q. Would they be left around until the loading was completed and then thrown in the corner?

"A. No, as fast as you empty one box you throw it up in the corner."

Mr. Crawford: The rest of that answer I do not think is responsive, so I am suggesting that it not be read.

Mr. Graves: I think it is perfectly proper.

Mr. Crawford: I move to strike it out as not responsive.

Mr. Graves: There is a stipulation in the record.

Mr. Crawford: There is no stipulation about striking out any answers.

The Court: I will grant the motion and give you an exception.

Mr. Graves: Exception.

Mr. Crawford: (continuing reading):

"Q. While you were in New York, did you see any boxes around the decks other than in this corner you have mentioned?

"A. No, I didn't see any, because just as fast as the box was empty it was being put up in this corner.

"Q. Didn't the ship ever get rid of these boxes?

"A. Certainly, when we got outside we got rid of them.

"Q. Not before it got outside?

"A. No. You ain't allowed to throw nothing overboard at the pier."

[fol. 242] Mr. Crawford: That is all on direct. I have some re-direct which I shall read after you read the cross, Mr. Graves.

Mr. Graves (reading):

"Cross-examination.

"By Mr. Graves:

"Q. In other words, they were kept on the deck until after the ship sailed and were thrown overboard then?

"A. Yes.

"Q. So after Redman left the ship they were thrown overboard?

"A. Yes, it was thrown overboard after he left, because he did not sail with the ship.

"Q. Mr. Ramsey, did you receive two letters from me?

"A. Yes.

"Q. Have you got those letters with you?

"A. No, sir.

"Q. What have you done with them?

"A. Well, I lost one of them, you see. I was in New Orleans when the first letter came to me.

"Q. You have thrown them away, is that right?

"A. I did not exactly throw them away, but I misplaced the first one before I could answer it, but the second one I answered that one.

"Q. I show you Plaintiff's Exhibit No. 1 for Identification, and ask you whether that is a copy of the first letter you received from me. Will you read that (handing paper to the witness)?

"A. I could not exactly say whether it is a copy or not.

"Q. Read it.

"A. This is just about the same.

"Q. That is a copy of a letter you got from me?

"A. I think it is just about the same.

"Q. I show you Plaintiff's Exhibit No. 2 for Identification, and ask you whether that letter, with the envelope, is a letter you sent to me. Read it over first (handing pa-

[fol. 243] per to the witness).

"A. Yes.

"Q. You wrote that letter?

"A. Yes.

"Q. And sent it to me?

"A. Yes.

"Q. That is all in your handwriting?"

"A. Yes.

"Q. And the signature is yours?

"A. Yes.

"Q. I show you Plaintiff's Exhibit No. 3 for Identification, and ask you to read that over (paper handed to witness). Did you get that letter from me, that is the only question?

"A. Just a minute.

"Q. Is that a copy of a second letter that I sent you?

"A. It may be. Let me read it and see what it is. Yes, I think it is.

"Q. That is a copy, isn't it, of the second letter that you got from me?

"A. Yes, that is all right.

"Q. Do you want to say anything else?

"A. No.

"Q. I show you Plaintiff's Exhibit No. 4 for Identification, and ask you whether that is in your handwriting and signed by you?

"A. Yes.

"Q. Will you read over Plaintiff's Exhibit No. 5 for Identification, with the envelope, and tell me whether that letter is in your handwriting?

"A. Yes.

"Q. Is that a letter written by you?

"A. Yes, it was a letter written by me.

"Q. And was Louis Alberts there when you wrote this letter?

"A. It was written through him.

"Q. He wrote it and you signed it, is that it?

"A. No, sir. He wrote it? No, sir—and I didn't write it. In fact, I knewed of it all right—in fact, he had this written, but I knew about it.

"Q. And you signed your name to it?

"A. No, I did not sign my name to it.

"Q. Didn't you just say you wrote that letter?

[fol. 244] "A. No. You must have misunderstood me. I did not write this letter, but I knew about it.

"Q. You mailed it?

"A. No, sir, I didn't mail it.

"Q. You saw it mailed?

"A. I seen it mailed.

"Q. You told him to mail it?

"A. No, sir, I didn't tell him to mail it.

"Q. You wrote it together, then?

"A. I knew that letter was going to be written but I didn't write it.

"Q. Didn't you say a minute ago you wrote that letter?

"A. I knew about that letter going to be written, but I did not write it.

"Q. Didn't you say a minute ago you did write it?

"A. No, sir.

"Q. Yes or no?

"A. No, I didn't say I wrote it.

"Q. Mr. Ramsey, do you know that an expert can tell a man's signature by comparing it with his signature on other letters?

"A. Yes.

"Q. I will ask you another question: Do you know that if you swear falsely you can go to state prison for it?

"A. Well, I will admit that.

"Q. I ask you to look at this again and ask you whether that name, 'George Ramsey' was written by you, in your handwriting? (Handing paper to the witness.) Do you make any further statement as to that? Is that signature yours, 'George Ramsey'?

"A. This signature is mine.

"Q. The signature is yours?

"A. Yes.

"Q. Now, you say there were four of you in all in the steward's department?

"A. Yes.

"Q. All colored men?

"A. Yes.

"Q. You say that all of those men had to pass inspection before they got the job and came aboard?

"A. Oh, no. Here, we didn't stand no inspection.

"By Mr. Meagher:

"Q. In Baltimore?

"A. No, sir, but when we got to New York we had to stand inspection to go to San Domingo.

[fol. 245] "By Mr. Graves:

"Q. You had stood inspection at some place or other?

"A. Yes, before.

"Q. And the same as to Redman, is that right, when he first joined the ship?

"A. No, he didn't stand no inspection here.

"Q. Do you know of your own knowledge whether or not——

"A. I know, because they never stand no inspection here in this outfit. It might be somewhere else he stood inspection, but I do not know.

"Q. You say they never stand inspection in this outfit?

"A. Not in Baltimore.

"Q. Not in Baltimore. But they did stand inspection in New York?

"A. Yes.

"Q. You all had inspection before sailing?

"A. Yes.

"Q. You were to sail early the morning of the 15th?

"A. No, sir. The orders was we were to sail at two o'clock.

"Q. What time did the inspection take place?

"A. The inspection took place on the 14th, after paying off.

"Q. On the 14th?

"A. Yes.

"Q. And everybody that was aboard was inspected?

"A. Yes.

"Q. All your department?

"A. Yes.

"Q. That is, yourself?

"A. Yes.

"Q. Is that right?

"A. Yes.

"Q. Redman?

"A. Yes.

"Q. And these two boys?

"A. Yes.

"Q. And all of you passed except this one boy that was fired; is that right?

"A. Yes.

"Q. You are positive about that?

"A. Positive about it.

"Q. Where did the inspection take place?

"A. Up in the Captain's room.

"Q. You were there?

"A. I was there.

[fol. 246] "Q. When the rest of them were there?

"A. No, sir, I wasn't there when the rest of them was there. We were called up one by one.

"Q. Did you go up with anybody else?

"A. No, sir, I went up by myself.

"Q. The doctor was there, was he?

"A. Yes.

"Q. The company's doctor.

"A. I do not know what doctor, but the doctor was there.

"Q. Anyway, you sent the men up for inspection?

"A. Yes.

"Q. And Redman went up?

"A. Everybody went up.

"Q. And they all reported back?

"A. Yes.

"Q. And one man didn't pass?

"A. This one boy knew he was not fit and he did not even go up.

"Q. The rest went up and passed?

"A. As far as I know.

"Q. As far as you know they passed?

"A. Yes.

"Q. Do you know the doctor's name?

"A. No, sir.

"Q. And he was thrown out because, you say, he told you he had some venereal disease; is that right?

"A. Yes.

"Q. This man 'Teeny'?

"A. That is what they called him. I do not know whether it was his name or not.

"Q. You are sure the rest of them passed?

"A. As far as I know they passed. He was the only one that didn't pass. He did not even go up because he knew he was wrong before and he didn't go up.

"Q. How long had Redman been on the ship with you prior to his leaving?

"A. I could not exactly say.

"Q. Was it one week, two weeks or what?

"A. It was more than one week.

[fol. 247] "Q. Was it a month?

"A. I do not know whether it was a month or more or less. I know it was more than two or one week, either.

"Q. During that time did he do his work all right?

"A. Yes.

"Q. Did he walk perfectly all right?

"A. As far as I know.

"Q. You didn't see any lameness?

"A. No.

"Q. Or anything wrong with any of his feet, or any part of his body?

"A. No, sir.

"Q. He seemed to be a well man?

"A. As far as I could see.

"Q. Did his work well?

"A. Yes. I did not want to get rid of him. That is why I kept his job until two o'clock.

"Q. He was a good worker?

"A. Yes.

"Q. Sober and industrious?

"A. He was. I didn't have no trouble with him.

"Q. Now, you say these stores came aboard and the boxes were opened and some of the supplies were put in the icebox on the well-deck, and some of the other stores were carried up above; is that right?

"A. Yes.

"Q. So some of these boxes were thrown on the well-deck and some up above, is that right?

"A. No, sir. When they took the stores from the dock they landed it on the welldeck and then we took them from there and put them where they were supposed to go, and when they came there and were opened, why, they stopped there on the well-deck, that is, the boxes.

"Q. They broke open the boxes or crates on the well-deck?

"A. Yes.

"Q. They carried the stores either up above or on the inside and left the boxes on the well-deck?

"A. In the corner.

"Q. By the ladder?

"A. Yes, in the corner.

[fol. 248] "Q. Right near the ladder?

"A. Yes, near by the ladder.

"Q. The starboard side of the vessel was against the dock, wasn't it, the right hand side?

"A. Yes, and the boxes was on the port side.

"Q. The boxes were on the port side?

"A. Yes. That is where the icebox was.

"Q. I thought you said the boxes were landed on the deck?

"A. The boxes were landed on the deck on the starboard side. After we taken the stuff on, we put it on the port side because the icebox was on the port side. After taking the things out of the box you put the box on the port side.

"Q. You say now the broken boxes were on the port side?

"A. The starboard side was along-side of the dock. The icebox was on the port side. After taking the things out of the boxes we piled them on the port side in the corner.

"Q. The boxes were on the port side?

"A. In the corner.

"Q. You are positive about that?

"A. In the corner.

"Q. None of them on the starboard side?

"A. When the boxes come aboard they landed on the starboard side.

"Q. I am talking about the broken boxes that were thrown aside?

"A. That was on the port side up in the corner.

"Q. Were some of them on the starboard side?

"A. When they come aboard they landed on the starboard side.

"Q. I am talking about the broken boxes that were cast aside.

"A. No, sir, there was none on the starboard side.

"Q. Positive of that?

"A. Yes.

[fol. 249] Q. As a matter of fact, you don't remember anything about the boxes?

"A. Well?

"Q. Yes or no?

"A. Let me tell you. These boxes, when they are landed on the starboard side, when they came from over the side on the dock, they landed here (indicating). This (indicating) is the starboard side. Over there (indicating) is the

port side. You take the box from here and take it to the port side and break it open. That leaves no broken boxes on the starboard side. You take these boxes over to the port side, break them open and take the stuff out and put the broken boxes in the corner.

"Q. As matter of fact, you don't know anything about any boxes, do you?

"A. I done told you all about the boxes.

"By Mr. Graves:

"Q. Do you remember actually anything about the boxes?

"Mr. Meagher: He remembers them very clearly, it seems to me.

"A. Like I first said, these boxes landed on the starboard side, and when you take it from there—the icebox is on the port side—that is where you take the boxes, from the starboard to the port side and load whatever it is in the icebox that has to go there. After you break it open, you store it in the corner until the ship gets outside, but there is no broken boxes on the starboard side.

"Q. You say some of the stores were carried up above?

"A. That is the dry stores were carried to the dry store room.

"Q. Where is that?

"A. Up amidships.

"Q. Which ladder did you go up for that?

"A. It didn't make no matter, you go up the nearest ladder and that was on the starboard side.

[fol. 250] "Q. You broke open the boxes before you went up the ladder?

"A. No, sir, all that goes up there would be biscuit boxes and boxes like that. You don't break open biscuit boxes; like milk and tomatoes and stuff like that. That is in pasteboard, you don't break that.

"Q. Now, it was your duty as steward to report, to make a written report of any accident in your department, isn't that right?

"A. Well, quite naturally it was, but the steward never carried the medicine chest on this ship.

"Q. There was no medicine chest on that ship?

"A. I didn't say that. I said the steward never took care of the medicine chest on that ship. The medicine chest was up in the captain's room. Any accident come about the mate would always take charge of that, but I never had the medicine chest.

"Q. Was it your duty, if one of your department came to you and told you of an injury, for you to report that?

"A. I sent them to the mate.

"Q. To the captain or the mate?

"A. I sent them to the mate.

"Q. Then it was your duty to report it?

"A. It wasn't my duty. They are supposed, if any injury happens, they go right to the mate.

"Q. It wasn't your duty to report it if they came to you?

"A. Well, I could have, but just to come right down to my duty, I didn't have anything to do with it, because the medicine chest was in the captain's room.

"Q. Did you do it on that ship?

"A. No, sir.

"Q. You never reported accidents that came to you?

"A. None came to me.

"Q. You never had an accident reported to you on that ship?

"A. No, sir.

[fol. 251] "Q. Never while you were working for the Bull Line?

"A. No, sir, not to take any note of it.

"Q. You never knew of an accident in your department while working for the Bull Line during the five years you worked for them?

"A. No, sir.

"Q. Never had anybody injured or sick in your department?

"A. Not in my department.

"Q. All the five years you worked for them?

"A. No, sir.

"Q. So that you never made any report of injuries, did you?

"A. No, sir, never yet.

"Q. You did not consider it any part of your business, is that right?

"A. I wouldn't say that, because it never comes to me to make any report. I never had no accident.

"Q. Or no sickness in your department?

"A. Somebody may say they felt bad, but they go up there and take a little medicine from the mate.

"Q. You never made reports of any accidents?

"A. We never had one.

"Q. If anybody came to you and said he was sick, you paid no attention to him?

"A. If anybody came to me and said he had got a fever, or something like that, I would say, 'Go to the mate', and they got a dose of Epsom salts.

"Q. You never reported those things to the mate yourself?

"A. I never reported no accident. Nobody ever came to me complaining about any accident.

"Q. If they had you would not have reported it.

"A. If they had I would have reported it, but they didn't.

"Q. I thought you said it wasn't your duty?

"A. The mate has got charge of the medicine chest and, naturally, if you come to me and say 'Well, my finger is cut', I take you to the mate, but if you don't come to me, [fol. 252] what must I do? Get you and carry you to him? No, I let you go there.

"Q. I thought you said nobody came to you?

"A. That is what I say, I never did report no accident because we never had any accidents whatsoever.

"Q. No illness?

"A. Not in my department.

"Q. Didn't anybody ever tell you of a fever or anything like that?

"A. Fever? If it don't run much they get a dose of Epsom salts.

"Q. Did any man in your department ever complain of an accident?

"A. Not that I remember, no accident that I had to report.

"Q. So you do not know what your duty was in that respect?

"A. Yes, I do, because the Bull Line was not the first outfit I worked for.

"Q. Then, was it your duty to report accidents?

"A. When I got a slop chest, an accident comes to me.

"Q. But on this boat you didn't have charge of the medicine chest?

"A. No.

"Q. So you didn't consider it was your duty to report the accident?

"A. If they had come to me, I would say, "You go to the mate.' Anybody can go to the mate and tell him 'So and so got hurt.' They can go and make their own statement. They may get their foot mashed on the deck and somebody call the mate and say, 'So and so got hurt.' He will come there and attend to him, but nobody reported no accident to me.

"Q. You didn't have charge of the medicine chest?

"A. No, sir.

"Q. So you did not consider it part of your duty to report accidents in your department?

"A. I reported it, if I had it, but I didn't have any.

[fol. 253] "Q. Did you consider it your duty to do so, if you did have it?

"A. If it were my duty, if somebody reported an accident to me, I would go to the mate and notify, 'So and so got hurt.'

"Q. Was it your duty or not?

"A. Whether it was my duty?

"Q. According to your understanding?

"A. It was my duty, yes, to do it, if I had a chance at the medicine chest, had charge of the medicine chest. In case I saw you get hurt, would I go around and look at you? I would tell the man in charge of the medicine chest that Mr. Graves got hurt.

"Q. Was it your duty to report it?

"A. It was my duty if I had charge of the medicine chest.

"Q. If an accident came to your attention and it was your duty, as you say, to report it, and you failed to report it, would that, in your opinion, have some effect on your standing with the company?

"A. Well, yes, if were my duty. Sure it would."

Mr. Crawford (reading):

"Redirect examination.

"By Mr. Meagher:

"Q. I show you Plaintiff's Exhibit 2 for Identification, and ask you whether or not that letter is in your handwriting?

"A. This letter, yes. That is the letter I answered Mr. Graves.

"Q. You wrote that letter yourself?

"A. Yes.

"Q. Did you compose it yourself?

"A. Yes.

"Q. Did you sign it yourself?

"A. Yes, this letter is in answer to his letter that he wrote to me.

"Q. Did anyone else assist you in composing it or writing it?

"A. No, sir. I just wrote him owing to what I knew about Redman.

[fol. 254] "Q. Did you consult with anyone else before you wrote it?

"A. No, sir.

"Q. I show you Plaintiff's Exhibit 4 for Identification, and ask you, is that in your handwriting?

"A. Yes.

"Q. The whole thing?

"A. The whole thing, yes.

"Q. Did you compose that yourself?

"A. Yes.

"Q. And you wrote it out yourself?

"A. Yes.

"Q. And you signed it yourself?

"A. Yes, every bit of it.

"Q. What is that fourth word on the seventh line?

"A. Fourth on the second line?

"Q. Seventh line.

"A. 'Went ashore'.

"Q. No.

"A. This is 'understand'.

"Mr. Graves: 'Answered one'.

"A. Yes.

"Mr. Meagher: What is it, Ramsey?

"A. I will read it.

"Q. No, don't read the whole letter, what is the fourth word on the seventh line?

"A. 'And answered one'.

"Q. All right, 'answered'. The fourth word is 'answered', isn't it?

"A. 'Answered', yes.

"Q. Did you consult with any one before writing that letter?

"A. No, sir.

"Q. Talk to anyone about it?

"A. No.

"Q. I show you Plaintiff's Exhibit 5 for Identification, and ask you, is that in your handwriting?

"A. This was not in my handwriting, but I knew about it.

"Q. Just answer my question?

"A. No, sir.

"Q. Is it in your handwriting?

"A. No, sir.

[fol. 255] "Q. Whose handwrting is it in?

"A. Well, James Albert. He was figuring on writing Mr. Graves.

"Q. Just answer my question, who write the letter, do you know?

"A. No, I don't know, but I knew about it and I signed my name there.

"Q. Is that your signature?

"A. Yes.

"Q. 'George Ramsey'?

"A. Yes.

"Q. And who wrote the words 'James Albert'?

"A. James Albert wrote it.

"Q. He wrote those himself?

"A. As far as I know he wrote them. He wrote these (indicating).

"Q. And you wrote 'George Ramsey'?

"A. Yes.

"Q. Did you read the letter before you signed it?

"A. Yes, I read it.

"Q. Did you know what was in it?

"A. Yes, I knew what was in it.

"Q. Did you understand it thoroughly?

"A. Well, I think I did. I am most sure I understand it.

"Q. Whom did you talk things over with before you wrote that letter (indicating)?

"A. Excuse me, Mr. Graves came and spoke to us concerning this case, and that is what I told him on this letter here (indicating Plaintiff's Exhibit 4 for Identification). That is my statement here that I give him. This is my statement that I gave him the first time he was here. That was on—I forget what date—anyway, it is all right, I guess.

"By Mr. Graves:

"Q. That was around January 9th, wasn't it?

"A. It could be that time. You see, Mr. Graves wrote me a letter.

"Q. It is dated right there?

"A. I do not know whether it is necessary, but I will say it anyhow. Mr. Graves wrote me a letter at home in [fol. 256] Charleston that he would be down there some time soon. Well, I left before he got there and came here seeking employment. I came here. Well, he went there, which he said, and my wife give him the address where my mail come here on 126 Market Space, and he came here and he found me. I mean, he knew I was there. He asked me concerning this case and this is what I gave him.

"Q. That is Plaintiff's Exhibit 4?

"A. Yes.

"Q. So you did not mail that letter?

"A. No, sir. He was sitting on one end of the table and I was on one end, like he is sitting there, and I gave him this.

"Q. Plaintiff's Exhibit 4?

"A. Yes, and he went away and then James told me he was——

"Q. James who?

"A. Albert came with the letter signed there just like my own. He told me he was going to write Mr. Graves a letter, which he did. I signed to it and he signed to it.

"Q. That is Plaintiff's Exhibit 5?

"A. That is it there (indicating). Finally after Mr. Graves came back, that was the second time, well, he didn't say much then because he seemed like he was in a hurry and he went away, and I didn't see him no more until now.

"Q. Well, did you and Albert have any talk together before this letter was written?

"A. No; well, Mr. Graves spoke to I and he together.

"Q. I do not mean Mr. Graves, you and Albert, did you and Albert decide to write this letter?

"A. He said he was going to write Mr. Graves the letter. I said, 'Go ahead'.

"Q. Did he tell you what he was going to put in it?

"A. No, sir, but after the letter was written, I seen it.

"Q. You do not know in whose handwriting this is?

"A. No, sir.

[fol. 257] "Q. Do you know Albert's handwriting, if you would see it?

"A. No. He can not write. That is one thing I know, he can not write.

"Q. You do not know who wrote this letter, Plaintiff's Exhibit 5?

"A. No, sir.

"Q. Can you read?

"A. Yes.

"Q. Were you there when the letter was mailed?

"A. I was there when the letter went out and mailed.

"Q. Who mailed it?

"A. Albert mailed it.

"Q. You say there was an inspection in New York on February 14th?

"A. Yes.

"Q. After you were paid off?

"A. Yes.

"Q. And that inspection took place up in the captain's room?

"A. Up in the chart room. You go right through the captain's room into the chart room.

"Q. Did you go up for inspection?

"A. Yes.

"Q. Was anyone with you?

"A. No, sir, just as they called us up.

"Q. You went up alone?

"A. Yes, just like they finished one and they called another.

"Q. Did each man go up alone?

"A. As far as I know they went up alone because I went up alone.

"Q. You say this man Teeny did not go up at all?

"A. No, he didn't go up at all. I can vouch for that.

"Q. Because he knew he could not pass?

"A. Yes.

"Q. Do you know whether or not Redman went up?

"A. Why, yes, Redman went up.

"Q. Did you see him go up?

"A. He left and went up and got inspected first and then I went after he came back.

"Q. Did you meet him coming back?

[fol. 258] "A. No, I stayed in the galley until he came back and I went up.

"Q. Did you see him go up?

"A. He left the galley to go up.

"Q. You didn't see him go up?

"A. No, I didn't see him go up, but I am sure he went up because he was signed on for the ship, so if he didn't stand inspection he couldn't sign on.

"Q. You spoke about this corner in which the broken boxes were thrown?

"A. Yes.

"Q. That was on the port side?

"A. Yes.

"Q. How far away from the icebox was that corner?

"A. Well, probably, about five or six feet from the icebox—it might be a pretty good six feet from the icebox, from the entrance of the icebox.

"Q. How far away from the ladder was it, the ladder leading from the well-deck to the upper deck?

"A. It ought to be, I figure, as far as I can think it ought to be about four feet, three or four feet from the icebox.

"Q. From the icebox or the ladder?

"A. From the ladder.

"Q. Now, let us clear up this matter of your duty. If the cook, or the mess boys in your department met with an accident and reported that to you, would you have any duty to perform, any duty at all?

"A. Well, it was not a bit my duty to perform under the circumstances, but I would——

"Q. You understand my question?

"A. Yes, I understand your question.

"Q. I do not mean whether it was your duty to treat them for the accident, but would you have any duty to perform; what would you do, what would you consider to be [fol. 259] your duty, if any, if they told you they had met with an accident?

"A. If they come to me with an accident I would say, 'Well go to the mate and the mate will treat you,' and then the mate would take a statement of his accident.

"Q. You would report it to the mate?

"A. Yes.

"Q. And that would be your duty?

"A. Yes.

"Q. Would the same thing apply if the mess boys or the cook were sick, not meet with an accident, but were sick?

"A. Well, if they were seriously sick, that is seriously sick, you should report that to the mate.

"Q. What would you mean by if they were seriously sick, if they couldn't work?

"A. Yes, if they couldn't work. But just like a light fever, or something like that, they would say, 'I need a dose of Epsom or a dose of oil,' and they would get it.

"Q. But if it was anything serious you would report it to the mate?

"A. Yes, I would tell the mate, 'Such and such a one is sick', and he would go and investigate into the matter.

"Q. If it was your duty to report an accident or an illness, and you failed to report it, that would make a difference in your standing with the company, wouldn't it?

"A. Well, yes, that would make a difference. I do not think they would do anything like firing me, but they would just make a difference with me with the company. It all depends on how it happens, if it is my fault in not reporting the accident.

"Q. In what?

"A. In not reporting the accident.

"Q. It would make a difference?

"A. I do not know, because I never had it.

"Q. What would happen?

"A. I do not know what would happen, because I never come in contact with it. You see I never had no accident [fol. 260] whatsoever.

"Q. Never at all?

"A. Never at all had an accident.

"Q. On board the 'Frances Weems' or any other ship?

"A. No, sir. Of course, there have been accidents, but that was with the engineers or the deck.

"Q. But never in your department?

"A. No."

Mr. Graves (reading):

Recross-examination.

By Mr. Graves:

"Q. You do figure you would get in dutch if you didn't report an accident?

"A. I wouldn't exactly figure I would get in dutch because if this accident had been reported to me, and I reported it to the mate, I would do it by telling the man—then I would say—'Go ahead to the mate and he will take care of you.'

"Q. But if you failed to report it to the mate you would get in dutch, wouldn't you?

"A. No, I wouldn't exactly get in dutch because he would go to the mate himself. If a man gets hurt accidentally he would go to the mate himself for attention.

"Q. Don't you figure you might get blamed for it if you don't make a report?

"A. No, sir, I ain't going to figure I get blamed. If you come to me and say you are hurt, I say, 'All right, come on, we will go to the mate', and I send him up to the mate. If he gets hurt seriously I would tell him to go to the mate, but for me to make a report, no, because I had no charge of the medicine chest.

"Q. In other words, you did not think it was your duty [fol. 261] to report?

"A. No, sir, but I tried to report it somewhere, because I tell him to go to the mate.

"Q. You didn't think it was your duty to report it to the mate yourself?

"A. I didn't say that.

"Q. Yes or no, do you think it was your duty or not to report it to the mate if somebody reported to you they had an injury?

"A. If somebody reported to me an accident, quite naturally, common sense would tell me to allow this man to go to the mate.

"Q. You didn't consider it your duty to report it?

"A. I don't have no accident sheets. The mate keeps all that.

"Q. No, but if you should have one.

"A. I didn't have none.

"Q. Well, do you consider it part of your duty to report accidents in your department?

"A. If I had an accident sheet it would be my duty then to report an accident.

"Q. You had no accident sheet?

"A. No, so then it all goes to the mate.

"Q. So you don't consider it was any business of yours?

"A. Well, it is my business to let them go ahead to the mate and report their own accident.

"Q. But not for you to report it?

"A. Well, I could have."

Mr. Graves: I offer in evidence the five exhibits that were identified, all of which the witness admitted either having received or written.

Mr. Crawford: No objection.

(Marked Plaintiff's Exhibit 1 in evidence.)

[fol. 262] (Plaintiff's Exhibit 1 read to the jury.)

Mr. Graves: I would like to have Plaintiff's Exhibit 2 marked in evidence.

(Marked Plaintiff's Exhibit 2 in evidence and read to the jury.)

Mr. Graves: I would like to have Plaintiff's Exhibit 3 marked in evidence.

(Marked Plaintiff's Exhibit 4 in evidence and read to the jury.)

Mr. Crawford: Mr. Graves, so there will be no mistake, those two that you have now read were in his own handwriting, is that right?

Mr. Graves: No; Plaintiff's Exhibits 2, 4 and 5 are, I think.

Mr. Crawford: The one you just read was in his handwriting?

Mr. Graves: Yes, in his handwriting.

Mr. Crawford: How about the first letter that you read, Plaintiff's Exhibit 2?

Mr. Graves: That was in his handwriting.

I offer Plaintiff's Exhibit in evidence.

(Marked Plaintiff's Exhibit 5 and read to the jury.)

[fol. 263] HERMAN CHARACHE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Crawford:

Q. Doctor, are you a physician licensed to practice medicine and surgery in the State of New York?

A. Yes, sir.

Q. And how long have you been practicing your profession?

A. Since 1929.

Q. And were you serving in the Cumberland Hospital in February, 1930?

A. Yes, sir.

Q. Are you still there?

A. Yes, sir.

Q. And what work were you doing there in February, 1930?

A. I was the house surgeon.

Q. Doctor, did you see Redman, the plaintiff in this case, when you came into the hospital?

A. Yes, sir.

Q. Do you recall what the first day was you saw him?

A. I don't recall, but can tell you the date that was on the chart.

Q. Can you refresh your recollection from the hospital records in this case for the purpose of testifying?

A. That is right, February 31st.

The Court: What did you say?

The Witness: It says here February 31st. There must be some error in the date.

Q. Look through the records, Doctor, and see if you can find anything?

A. 21st. There must be some error on the chart.

The Court: The 21st of February?

The Witness: Yes, sir.

Q. Do you recall whether you saw this man on that day, Doctor, or the next day, or when?

A. I cannot say exactly when I saw him, but I saw him [fol. 264] quite often; practically every day, but precisely when, whether it is on the first day or not, I cannot remember.

Q. You will depend on what time he got in, on that day, I suppose?

A. Yes, sir.

Q. Doctor, when you saw this man's foot for the first time what did you observe about it?

A. Well, he had the beginning of gangrene around the top, around the five toes here (indicating), extending slightly above the beginning of the arch and then he also had some blisters above that.

Q. Was there a line of demarkation between the gangrene and the good flesh?

A. I cannot remember exactly. The line of demarcation is very vague because a line of demarkation simply means a very sharp, complete demarkation between the gangrenous part and the healthy part.

By the Court:

Q. Was there a line of demarkation?

A. Demarkation simply means a line.

Q. Was it marked; could you tell where the gangrene ended and where the good flesh began?

A. Not very sharply.

By Mr. Crawford:

Q. And about where was that line on his foot? Indicate if you will, on your foot.

A. I believe it was around this area here (indicating), like this, below the shoe lace.

By the Court:

Q. Is there anything here that will help you refresh your memory about that?

A. Perhaps there is. I believe there is some chart there. [fol. 265] Q. Will that help you refresh your recollection?

A. Yes, I believe there is some diagram. I want to refer to it.

Mr. Graves: You did not make that diagram, did you, Doctor?

The Witness: No, sir.

Mr. Graves: Then I object to it.

The Court: It makes no difference. He can refresh his memory from anything in the world if he swears that he can remember after refreshing his memory.

The Witness: I believe it was much less than this.

The Court: Just tell us what you remember. You are under oath.

By Mr. Crawford:

Q. Just your own recollection.

A. My own recollection is that it extended as far as here (indicating). It did not include the entire arch here (indicating); it was below the arch. Later on it extended further.

Mr. Crawford: Indicating a place below the lace on the shoe, Mr. Graves.

Mr. Graves: I will take your word for it.

The Court: How far did it extend when you last saw it?

The Witness: When I last him him—I saw him after the operation, when the leg was gone. But, if you mean the last time I saw him before the operation, it extended high up, I think about the lower third of his leg. It ex- [fol. 266] tended that far before they operated on it (indicating).

Q. That was some two months later, Doctor?

A. Yes, sir, perhaps more; I can't recall.

Q. You first saw him on February 21st or 22nd. When did you first see that spread so far?

A. Well, I could find out the date of the operation—the day before the operation, because I had to prepare him to be operated on.

Q. And you assisted in that operation, did you?

A. Yes, sir.

Q. Did you treat this man's leg practically every day, Doctor?

A. Yes. I supervised the treatment and on occasion I treated him myself.

Q. What did that treatment consist of?

A. That treatment consisted of formaldehyde, the percentage of which I do not remember, and we did not dress it. We just let it stay without any dressing; just formalin as an antiseptic.

Q. Doctor, did you talk to this man at any time during these various occasions when you were treating him?

A. Surely, the same as any other patient—nothing particularly.

Q. You talk to all the patients about the history of their cases, don't you?

A. Yes.

Q. And did this man Redman at any time tell you he had run a nail in his foot?

A. No, sir.

Q. Doctor, could you see any mark on this man's foot, in the position just above the shoe, on the instep, that would indicate that he had any wound there or any scratch deep enough to bleed; an inch and a half long, the position being just above the tongue on the shoe, on a low shoe?

A. No, sir.

Q. And was there any wound at that place, Doctor, when [fol. 267] this man came to the hospital?

A. I don't recall seeing it.

Q. Doctor, do you know what type of gangrene this was?

A. Yes, sir.

Q. Was it the type of gangrene that is brought about by an infected wound?

A. No, sir.

Q. What type was it?

A. It was dry gangrene.

Q. And what in your experience is that brought about by; what brings about dry gangrene?

A. In this case or in general?

Q. In that case what was your diagnosis?

A. Do you want my opinion?

Q. I want your opinion.

A. According to the history that he gave in the hospital he stated that he had pain in his leg; I mean, this is on the chart. He had pain in the foot.

Mr. Graves: I object to that as assuming something that is not in evidence.

The Court: You can avoid that. Assume these facts.

Mr. Crawford: I will withdraw the question.

By the Court:

Q. Doctor, did you ask him anything about the history in this case?

A. Usually I do.

Q. Did you, Doctor?

A. I don't remember.

Q. Is there anything that will refresh your recollection whether you asked him about his history? Is there anything in the record that will refresh your memory?

A. No, sir.

Q. There is not?

A. No, sir; I will have——

Q. There is not?

A. No, sir.

The Court: Tell him what you think is proven and then [fol. 268] he can assume that and express an opinion.

The Witness: The man stated on the chart in the history that he developed pain in his foot. He went to a friend who advised him to immerse his foot in hot water and he burned his foot. The statement has been recorded by the interne who testified this afternoon with some other doctors. According to laboratory finding the man had syphilis. Also, according to the history taken by Dr. Shatara, he stated that he man was alcoholic.

The Court: What?

The Witness: The man drank a great deal. He made some statement in that chart, according to the history there.

Mr. Graves: I move to strike it out. The doctor was here and did not testify about that.

The Court: Are you objecting to this or not?

Mr. Graves: All right; go ahead.

The Witness: It is on the chart. In order to develop gangrene a patient has to have a disease of the arteries; in other words, gangrene is caused by exclusion of or the shutting off of the blood supply to a part, which results in gangrene or death of the part of the body. In this particular case, as my opinion is concerned, he had a burn from the hot water that he soaked it in. Having diseased arteries and arteritis, which is present in the case of syphilis—the tissues, in the case of syphilis, pathologists explain that it is a thickening of the intima; that is, the [fol. 269] arteries are formed of three coats; external, middle and internal. Ordinarily the lining of the arteries is very smooth so the blood-stream could flow through it without any finding of any resistance. If the internal coat of the artery, that is, the intima is damaged, in the case of arterio-

sclerosis or in the case of syphilis there is a thickening of the intima, there is a formation of certain plates or certain hard spots which in the autopsy you could almost peal out and it would form a hole in the blood vessels.

These arteries did not correspond, the healing part of these arteries were not as well as your- or mine would be if we did not have any syphilis. It included a thrombus and included gangrene.

Q. Doctor, at the time the operation was performed, did you get any further evidence that these arteries were diseased or impaired?

A. During the time of operation, while he was operated on there was very little bleeding; in fact there was no tourniquet applied. We made a circular incision around the foot without using a tourniquet and there was very little blood coming out of the artery after it was cut.

Q. What was that evidence to you of, as a surgeon?

A. There is a thrombosis or embolism. To make it more clear—there is an obstruction. Where there is a thrombosis or an embolism, it means an obstruction to the flow of the blood.

By the Court:

Q. It is used in the medical profession to signify different things; embolism and thrombosis?

[fol. 270] A. Well, for practical points it means the same thing. It means an inclusion of a blood vessel.

Q. Do they refer to different causes of obstruction?

A. Not necessarily.

Q. Different objects of obstruction?

A. Yes, there are different objects.

Q. Is the thrombosis referred to one kind of an obstruction, of some material, and an embolism an obstruction of a different material, or, specifically, does one refer to an obstruction caused by a blood clot and the other refer to an obstruction caused by some membrane or some foreign substance?

A. Both of them are caused by foreign substances.

Q. Is a blood clot a foreign substance too?

A. Resulting in a foreign substance or an injury. That is, it is considered as a foreign substance. It is part of——

Q. When you talk to a physician and you tell him about embolism, would you tell him about a thrombosis; will that make any difference?

A. Yes, it does.

Q. What is the difference?

A. An embolism is a substance which is movable; in other words, it comes from another part. If we have a diseased heart or a certain kind of disease of the valves of the heart, a piece of it might break off, go through the bloodstream, stopping there; that is called an embolism. It moves down; then it stops. Blood will gradually accumulate around this particular point. It may be the size of a pinhead and just like a snowball it gets larger and larger, forms a thrombosis. It is a case of where an embolism will cause a thrombosis.

Q. Doctor, from your experience, from your actual treat- [fol. 271] ment of this case, will you state whether or not, in your opinion, the gangrene that you saw in this foot was or could have been caused by an infection of a wound?

A. There was no evidence to show that.

Q. That is not the question.

A. I mean there was no evidence on the patient to show that.

Q. You saw no evidence of any traumatic injury?

A. No, sir.

Q. Doctor, could a wound or traumatic injury be a competent producing cause of gangrene?

A. Yes, it can.

By Mr. Crawford:

Q. But could it be a competent producing cause of this dry gangrene that you testified you saw in this patient; this particular case of dry gangrene?

A. Not in this case.

Mr. Crawford: That is all.

By the Court:

Q. But in any case?

A. In some other cases, yes; generally speaking it may.

Q. Generally speaking a traumatic injury may be a competent producing cause of dry gangrene?

A. Yes, providing you have diseased arteries.

Q. Could it also be a competent producing cause of moist gangrene?

A. Very rarely; but it might.

Q. Possibly?

A. Possibly.

By Mr. Crawford:

Q. Can an infected wound be a competent producing cause of dry gangrene?

A. Not dry—wet.

Q. Doctor, were you subpoenaed to come to court in this [fol. 272] case by the plaintiff's attorney?

A. Yes, sir.

Q. That was on Wednesday, the first day of the trial, was it not? That was when Dr. Wikle was here in court?

A. Some time ago, but I have been told not to come. That was—I don't remember—perhaps seven weeks ago.

Q. You were called two days ago?

A. Yes, that was the second time I was called up.

Q. When you came here two days ago were you subpœnaed here by me or by the other attorney?

A. By the other attorney.

Q. And were you told not to come back in court?

A. Yes, sir, I asked him whether he wanted me and he said no.

Cross-examination.

By Mr. Graves:

Q. And you appear here today at my request?

A. No.

Q. I never offered to pay you, Doctor, did I?

A. No, sir.

Q. You got a subpœna fee of fifty cents or a dollar?

A. Yes, sir.

Q. You are getting paid by the other side for your expert opinion here?

A. Yes, sir. Not for my expert opinion.

Q. You are being paid for your time in court?

A. Yes, sir.

Q. It is more than a dollar, isn't it?

A. It is more than a dollar.

Q. You are getting paid a fee for your time?

A. Yes, sir, surely.

Q. Didn't you just state in answer to his Honor's question here that if a man had diseased arteries that a wound could be a competent producing cause of dry gangrene? [fol. 273] Didn't you so state?

A. As I remember it, I just said an injury.

Q. Or any injury?

A. That is right.

Q. We will say the kind of an injury we are talking about here. It could be a competent producing cause, could it not?

A. Yes, sir, if the diseased arteries are present.

Q. Doctor, there is a difference between a thrombus and an embolism, is there not?

A. Yes.

Q. Do you think this man had a thrombus or an embolism?

A. It is very difficult to state what he had, but, as I explained before, the man had an obstruction to the flow of the blood. Whether this was the result of an embolism, that is, a piece of material coming from above, and then stopping here and obstructing it, or whether it started there—no one could tell that. He had an obstruction to the flow of blood.

Q. And you use as an illustration a piece of rotten tissue from the heart?

A. Yes.

Q. As an illustration?

A. Yes.

Q. This man's heart was all right, was it not?

A. According to the chart, yes.

Q. According to the chart it was perfect, wasn't it?

A. Yes.

Q. As a matter of fact, there was nothing wrong except that there was a latent syphilis in his system?

A. That is right.

Q. And his arteries were impaired to a certain extent?

The Court: Was it a latent syphilis, Doctor? Do you know it was a latent syphilis; did you examine him?

The Witness: Well, the latent syphilis simply means he had it a long time. He hasn't got any symptoms. He did [fol. 274] not have a skin lesion and it must have been a latent syphilis.

Q. It was a latent syphilis?

A. Yes, sir.

Q. Doctor, isn't it possible that a person could have latent syphilis without symptoms and know nothing about it and go on for years and be to all intents and purposes well?

A. Well, depending to a certain degree by what you mean by well.

Q. Well, I mean reasonably well, able to walk around and do his work?

A. For a certain number of years.

Q. For a great many years; perhaps all through life, isn't that so, Doctor?

A. It is possible.

Q. It is very common, isn't it?

A. Not common.

Q. Don't you often find in post mortems that people have had syphilis of the nervous system or of some other internal nature, maybe of the spine or something, that nobody ever knew anything about and no doctor ever knew anything about, and it was after death that it was discovered?

A. That is impossible. The reason why I say it is that any hospital today, in New York, or any other state, there is always a blood test taken. Therefore, a doctor could tell you whether he had syphilis or otherwise before he dies.

Q. Doctor, will a trauma or a subsequent infection light up or activate the latent syphilis and result in various types of diseases?

A. Will you mind repeating it again?

Q. Will a trauma, that means some sort of an injury?

A. That is right.

Q. Or a subsequent infection light up or activate a latent syphilitic condition and result in various types of dis- [fol. 275] eases?

A. That isn't only true of syphilis, it is true of numerous diseases.

The Court: Is it true of other diseases, too?

The Witness: The lighting up—but, at the point of injury.

Q. Yes.

A. Yes.

Q. It will make it active?

A. The diseased arteries, yes, if an injury is present.

Q. In other words, the latent condition can go on indefinitely if it is not lit up, but an accident can light it up, is that right; can that happen?

A. That is right.

Q. Doctor, I will ask you one more question. Do you agree with Da Costa that syphilitic atheroma of the blood vessels with such trauma or infection will produce an endo-arteritis and inclusion of the lumen of the blood vessel with consequent gangrene?

A. Will you repeat it again, please?

Q. Certainly. In syphilitic atheroma of the blood vessels, will such trauma or infection produce an endo-arteritis and inclusion of the lumen of the blood vessel with consequent gangrene?

A. Well, I said it before.

Q. So that, as a matter of fact, Doctor, you were more or less in the dark in the beginning as to the exact cause of what this gangrene was?

A. I just told you what the symptoms were.

Q. An injury might have made a big difference in your opinion, isn't that so?

A. Injury might be either thermal, electric or direct injury; that is, where the leg is struck with an iron or something, whether it is burned by heat, or whether it is frozen, [fol. 276] if the blood vessels are diseased you may get gangrene in that part.

Q. And if you had known about an accident, or, assuming that there had been an accident and this man had diseased arteries or impaired arteries it would have made a big difference in your opinion as to the actual cause of this gangrene, wouldn't it? In other words, that is a factor that was left out of your consideration, is that true?

A. No, it is not left out. About a dozen doctors examined him and there is no history there of an injury.

Q. That is, nobody told you about it, but, if you heard about it it would have made a big difference, wouldn't it?

A. You mean as to the origin?

Q. Yes, as to the origin.

A. Instead of thermal it might have been direct injury. If he was injured, that is.

Q. Yes, sir, you would have said it had something to do with this condition?

A. It might have been a second condition. In other words, there is an injury. The man, bathing his leg, he burned it. He had diseased arteries; then he burned it. So far I base my opinion that the man developed gangrene from burning his leg; to wit, he had diseased arteries. The way you said it then he would have a second factor; that he received an injury, then he burned it, then he got gangrene.

Q. You think this gangrene was caused by a burn, do you?

A. Yes, he burned it with hot water.

Q. He burned it with hot water?

A. Yes.

Q. You think that is what caused the accident?

A. Yes. I beg your pardon?

[fol. 277] Q. You think that is what caused his condition? You think because he put on some hot applications?

A. Yes.

By the Court:

Q. Doctor, can you express an opinion with reasonable certainly as to the competent producing cause of the gangrene which you have described to the jury as being present in the case of Donald Redman?

A. Well, I doubt if any doctor could explain with reasonable certainty as to what——

Q. You say even with reasonable certainty?

A. Yes, reasonable certainty, but, I will repeat what I said before again. There is a man who had diseased arteries. He had a syphilis condition. The lumen of the arteries were included; there was possibly a small opening there. Then he comes in with a history that he has got pain in his foot; puts it in hot water; burns his foot. The lumen closed up in it and he developed gangrene. At least, this is my opinion. I think that is how it developed, as I said before, with reasonable certainty.

By Mr. Graves:

Q. Doctor, in your opinion, you have left out the assumption or the hypothesis that a nail had scratched this man's foot, haven't you?

A. Because I have to take your word for it. It is not on the chart.

Q. If it was in there, your whole opinion would be different?

A. It would only be an additional factor.

Q. It would make you very uncertain about the whole thing?

A. It would be one additional factor; nail plus heat. [fol. 278] Now, heat is the only thing I have got to go on.

Q. But, if the nail had been there in the history, you would say without doubt that that was one of the causes of this gangrene, would you not?

A. A nail plus heat. I will include one more factor.

Q. Of course, you don't know how much heat was applied?

A. Naturally, of course not.

Q. But this man had blisters all over the instep?

A. Yes.

Q. And the skin was bruised there?

A. Yes.

Q. It was in a torn condition?

A. The skin was all broken.

Q. It was in a torn condition, the skin was all broken; there was blisters, were there not?

A. He had some blisters, yes.

By the Court:

Q. What was the cause of that? Can you speak with reasonable certainty?

A. Yes, sir; hot water would produce blisters.

Q. But you didn't lift the skin from these blisters to see what the wound was?

A. The skin was on the blister. You do not have to lift the skin from the blisters.

By Mr. Graves:

Q. Doctor, as a matter of fact, this man did not get any treatment for syphilis until he had been in the hospital for over three weeks, did he?

A. The chart will tell; I can't remember.

Q. The chart says, I think on March 13th, does it not? March 13th, is that right, 1930?

A. Yes, sir.

[fol. 279] Q. So that you certainly did not consider syphilis very much of a factor until after that date or you would have given that treatment before, isn't that so?

A. Well, if I remember correctly, as he was going on the chart we called a consultation and it takes some time before the consultation is ended. If the patient comes in it takes about a week before we get a Wassermann report from the laboratory. Then we have to wait and find out from the chief whether he wants a consultation. He is the only one who could O. K. a consultation. Then a consultant is called and we have to wait until the consultant is called. That might explain the delay.

By the Court:

Q. Doctor, let me ask you this question: Would you say that syphilis is a competent producing cause of gangrene?

A. Syphilis alone?

Q. Yes.

A. Very rarely.

Mr. Graves: I guess that is about all, Doctor.

Redirect examination.

By Mr. Crawford:

Q. Doctor, you left out of your consideration the existence of a wound in this case because you never saw the wound?

A. Never saw any.

Q. And you never heard of a wound?

A. That is true.

Q. And you never heard of a nail?

A. No, sir.

Q. And on this man's instep, the foot that you examined, you never saw any evidence of a scratch or of a nail wound?

A. Neither did any other doctor.

Mr. Crawford: That is all.

[fol. 280] FUAD SHATARA, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Crawford:

Q. Doctor, you are a physician duly licensed to practice in the State of New York?

A. I am.

Q. And how long have you been practicing in this state, Doctor?

A. I was graduated in the year 1916.

Q. From what college?

A. College of Physicians and Surgeons.

Q. Is that connected with Cornell University?

A. Columbia.

Q. Columbia University?

A. Yes, sir.

Q. Doctor, have you specialized?

A. Yes, sir.

Q. What is your specialty?

A. Traumatic surgery.

Q. And have you done that work almost exclusively for some years now?

A. I am chief of the traumatic service at the Cumberland Hospital at present, and I am on the teaching staff at the Long Island College Hospital and formerly taught anatomy at the same institution.

Q. Do you still do some work for the Cumberland Hospital?

A. I am chief of the traumatic service now and on the visiting staff.

Q. How long have you held that office, Doctor?

A. Which one?

Q. As head surgeon; head traumatic surgeon, I think you call it?

A. The traumatic service was organized about two or three years ago, I think, and ever since I have taken turns at it. It is a rotating service.

Q. You were associated with the Cumberland Hospital in February, 1930, were you?

A. I was—no, not in February; in March.

[fol. 281] Q. Do you remember seeing this plaintiff, the plaintiff in this case, Donald Redman?

A. I do.

Q. Practically as soon as you went in the hospital?

A. Yes, sir.

Q. That was around the 1st of March, was it?

A. About the 1st of March.

Q. And did you look at his foot at that time?

A. I did.

Q. And what did you observe about it?

A. He had a gangrene of his foot and he had had a peri-arterial sympathectomy performed by my predecessor on the service, by Dr. Wikle.

Q. And will you describe the foot, the way it looked when you saw it around the 1st of March?

A. He had a typical dry gangrene of the foot. The foot was more or less mummified. The toes were black and the gangrene was spreading slowly from day to day.

By the Court:

Q. Could you tell over how long a period the gangrene existed? Does that come on suddenly?

A. Of course, I had to read the history, your Honor. I read the history and I acquainted myself with what they had done before I went on.

By Mr. Crawford:

Q. Doctor, when you saw this foot, how high had the gangrene spread on the instep? Can you point it out?

A. I don't exactly remember, but, it was pretty——

Q. And were you called in connection with the possibility of an amputation or would you have seen the man in any event in your position in the hospital?

[fol. 282] A. I would have seen the man in any event. He was on my service.

Q. Did you and the other doctors have any consultation with respect to whether or not amputation was immediately necessary?

A. Yes, sir.

Q. What was your conclusion on that?

A. My conclusion was to give the man the benefit of the operation which Dr. Wikle had performed in the hope of saving his leg. The operation had been performed shortly before I went on service, some time in February, and while it is true that he had the gangrene when I saw him, had he

not had the arterial sympathectomy performed I would have advised an amputation without further delay. But I did want to wait and give the man the benefit of the operation Dr. Wikle performed.

Q. Doctor, did you see any infection in connection with this foot?

A. No, sir.

Q. Was this an infectious or gaseous gangrene?

A. No, sir.

Q. You had considerable experience in treating cases of gangrene, did you not, Doctor?

A. I have.

Q. How many cases, would you say, you have handled in the last five years?

A. I couldn't give you a number, but we have a very active service there, and we see practically as many cases as any large hospital in the city.

Q. Will you state from your experience, Doctor, whether this dry gangrene that you saw in this man's foot was caused by any infected wound or scratch on his foot?

A. It was not.

Q. Did you see any signs of any wound, cut or scratch on his foot?

A. I did not.

Q. If this gangrene had been caused by an infected cut, would the point of that infection and the cut have been [fol. 283] visible on the 1st of March, assuming that the cut had been made on the 13th of February, if it is a wound, a cut, sufficiently deep to bleed and to cause this infection?

A. If this cut had led to the infection you would have had a lot of local signs there of the infection.

By the Court:

Q. Even when you saw him?

A. Yes, sir.

Q. How long after?

A. About seven days—eight days.

Q. When did you see him?

A. The 1st of March.

By Mr. Crawford:

Q. What is the distinction between moist and dry gangrene, Doctor?

A. Well, just as their names imply. Moist gangrene shows some moisture and dry gangrene is dry. It is usually conceded that dry gangrene—that moist gangrene is caused by either a xenogenetic obstruction. At the same time the arterial obstruction is so that the fluid is not drained from the extremity or by superimposed infection.

Q. You recognize Dr. DaCosta as an authority on surgery, do you not, Doctor?

A. Yes, sir, I do.

Q. Do you agree with him when he says: "When gangrene results from inflammation, strangulation, and infection, it is certain to be of the moist variety, because the tissues are sure to be filled with fluid"?

A. Absolutely.

Q. Were you the surgeon in charge of the amputation of this man's leg?

A. Yes, I amputated it myself.

Q. And will you describe that amputation; where you amputatt

A. We amputated above the knee. We used no tourni- [fol. 284] quet to stop the bleeding and we noticed at the time of the operation that there was no—not much bleeding.

Q. And, Doctor, what does that indicate to you?

A. That indicates an endo-arteritis or sclerosis of the arteries.

Q. And when you amputate a sound limb?

A. We usually use a tourniquet.

Q. Is it necessary to use a tourniquet?

A. It is better.

Q. For what purpose?

A. To control the bleeding. You have a big vessel.

Q. So the patient would not bleed to death?

A. That is right.

Q. Doctor, do you recall, without refreshing your recollection, the date of the amputation?

A. I made a note of it here.

Q. Can you refresh your recollection from that note and give us the date?

A. The amputation was performed on the 17th of April of 1930.

Q. April 17th, 1930?

A. Yes.

Mr. Crawford: It is conceded, is it not, the date of February 21st?

Mr. Graves: That is right.

Q. So your amputation was performed about two months after the man was admitted to the hospital?

A. It was.

Q. In cases where there is infectious gangrene, gangrene caused by infection, is it good practice to permit a limb to stay without amputation for that period of time; two months?

A. My experience is that when amputation is performed for an infection it has to be performed immediately because it becomes the choice between the life and limb.

[fol. 285] Q. And where there is an infection that is a case of moist gangrene?

A. Usually, yes.

Q. In this case when you amputated the limb was it for the purpose of saving the man's life or otherwise?

A. No, sir, his life was not in danger then, but his limb was useless.

By the Court:

Q. What is that?

A. His limb was useless.

Q. Is that painful gangrene?

A. Gangrene? Well, in certain stages, your Honor, in the beginning it is painful and then when the nerves become involved then the nerves are dead and then they have no pain.

By Mr. Crawford:

Q. Doctor, did you talk to Redman about the history of his case at all?

A. I don't remember.

Q. Will you state to the Court and jury, please, what in your opinion was the cause of this case of gangrene that you observed in Redman in March, 1930?

A. Well, he had syphilitic endo-arteritis, to begin with, and he was an alcoholic, according to the history; that is, if the history is correct. Te drank plenty of alcohol and we know that alcohol and syphilis are a very bad combination. Those two would be enough to give him gangrene.

And then there is an additional story of burn by hot water which may have acted as the immediate exciting cause of the thing.

Q. Doctor, would blister burns on his foot be enough to obstruct any wound that had been deep enough to bleed considerably?

A. If the blister wound was superimposed directly over the point of entrance of the wound it might.

Mr. Crawford: That is all.

[fol. 286] Cross-examination.

By Mr. Graves:

Q. Doctor, do you think this man had an embolism?

A. I don't think so.

Q. As a matter of fact, there is a recognized operation for embolism, is there not?

A. Embolectomy, you mean?

Q. Yes?

A. Yes.

Q. And they tap the artery and take the embolism out?

A. It is not very successful.

Q. Well, it is done and DaCosta recommends it, doesn't he?

A. Only when it is high up; in the cases where the artery is high enough to be opened and sutured.

Q. Do you think he had a thrombus?

A. Yes.

Q. Do you agree with DaCosta when he says that a thrombus alone will not cause gangrene?

A. A thrombus alone will cause gangrene.

Q. May I read it to you?

A. You might.

Q. "A thrombus in an artery rarely causes gangrene except in the aged or when it forms upon an embolism. In a pure thrombus the circulation has time to adjust itself, but gangrene may follow thrombus formation and when it comes on——"

A. Yes.

Q. So it is very rare for a thrombus alone to cause gangrene, isn't that true? Doesn't it so state there?

A. It does not so state there because you will have to read the whole statement.

Q. "A thrombus in an artery rarely causes gangrene except in the aged——"

A. That is right.

Q. This man was not aged, was he?

A. His arteries were aged. He had arteries equivalent to those of a man of seventy.

Q. Don't you know that senile gangrene never occurs in anybody under fifty years of age?

A. I did not say he had senile gangrene.

[fol. 287] Q. That is in the book too, isn't it?

A. Yes.

Q. You are being paid, aren't you, for your testimony on the stand?

A. Not for my testimony, sir.

Q. You are being paid by the other side, are you not?

A. For my time; not for my testimony. I would like you to make that distinction, please. I won't stand for that. My testimony is not for sale, sir.

Q. Well, as an expert.

A. Yes, my time is, but not my testimony. I have to testify to the truth whether you pay me or do not pay——

Q. You are being paid——

Mr. Crawford: Will the Court please instruct Mr. Graves to allow the witness to finish his answer.

A. (Continuing:) My testimony is not for sale. I have to testify to the truth irrespective of whether I am paid or not and I get paid for my time. I hope you appreciate the distinction.

Q. I am talking, Doctor, about giving your opinon.

By the Court:

Q. Irrespective of every other consideration you express your true opinion?

A. Absolutely and I don't know whether that question——

Q. I am asking you, Doctor, if you get paid for your time?

A. Not for my opinion. I get paid for my time.

By Mr. Graves:

Q. How much, my I ask?

A. It is none of your business.

[fol. 288] By Mr. Crawford:

Q. I haven't told you that, have I, Doctor?
A. No, sir.

By the Court:

Q. Are you to be paid whether the suit is won or lost?
A. Yes, sir. I am to be paid for my time; whether the case is lost or won.

By Mr. Crawford:

Q. Doctor, referring again to DaCosta, do you agree with the statement when he says: "In a drunkard or in an advanced case of syphilis the changes characteristic of age may appear while the man is young in years."
A. That is what I said a moment ago.

By Mr. Graves:

Q. Doctor, as a physician, if a person is predisposed to senile gangrene some whiskey is a good antidote, isn't it?
A. I have never heard of it.
Q. May I read you some more?

By the Court:

Q. Will whiskey in large amounts aggravate it and cause a return of gangrene?
A. If it is syphilitic. Syphilis and alcohol are a very bad combination.
Q. Will whiskey in a moderate amount, to a moderate extent, be harmful?
A. Not to a non-syphilitic.
[fol. 289] Q. Will you please read this paragraph in DaCosta, on page 96, entitled "Prevalence of senile gangrene in the predisposed."
A. You read it.
Q. I will read it and ask you whether you agree with that.
A. All right; I will read it.
Q. Do you agree with that that whiskey is a good preventative for gangrene?
A. That isn't what he said. He did not say whiskey was a preventative. He said moderate doses of whiskey

in the senile, that is, not in the syphilitic, will in some cases help because whiskey is a stimulus.

Q. He said "If the subject is syphilitic also give him salvarsan"?

A. He said if he is senile give him whiskey, but, not if he is syphilitic.

Q. You put a different interpretation on it?

A. I put a different interpretation on it.

Mr. Graves: That is all.

Mr. Crawford: That is all.

Mr. Crawford: It is stipulated between counsel that the steamer "Frances Weems" left Brooklyn at 2:35 on the 15th day of February, 1930.

The defendant rests, if the Court please.

(Defendant rests.)

The Court: Is there any rebuttal?

Mr. Graves: Just a little.

Donald Redman, the plaintiff, recalled (in rebuttal), testifies as follows:

Direct examination.

By Mr. Graves:

Q. Mr. Redman, did you hear Mr. Suessmith on the stand this morning, right before lunch?

A. Yes, sir.

[fol. 290] Q. And did you hear him make the statements about the various times that he saw you?

A. Yes, I listened to him.

Q. Will you tell the Court and jury what the occasions were, and your version of it?

A. Yes, sir. After I was discharged from the hospital I came out. It was in the month of February, February 21st, that I was discharged, 1931. Well, at that time it was very windy. I was on crutches then and I could not very well come to the Bull Line. I didn't have much money to take no taxi, so I went back to the same place; I went from 32 Hamilton Avenue. I returned back there to live after I came out of the hospital and I was on crutches and

I couldn't go on out to find out where the Bull Line office was. I remember when I was on the boat that it was in the Whitehall Building, or Whitehall Street. At that time it was, in 1929, or somewhere around there. When I took my crutches, after the wind was heavy, at that time in that month of February, I took my crutches and went out for about a week and four days after I came out of the hospital—I went up to the Whitehall Building and one of the elevator men, I asked where is the Bull Line office that used to be here.

Mr. Crawford: If your Honor please, he went to the Bull Line office, I suppose. Let him lead up to Suessmuth.

The Witness: I want to tell the jury what Suessmuth said.

Q. Make it as short as you can, Mr. Redman.

A. They had moved to 115 Broad Street when I did locate the place that day. I don't know the date myself, but it was very late in the evening, near time for them to quit. [fol. 291] An investigator, seeing me on the crutches, said, "What do you want?" I said, "I am coming here to report." I said I was just out of the hospital with blood poisoning; with a foot that was just amputated. I wanted to see the general manager. He says, "All right, take a seat." So I put my crutches down.

Mr. Crawford: If the Court please, this is not a report. I think the man should be permitted to tell what he did, but not conversations with some clerk.

Q. Just tell us how many conversations you had with Suessmuth and others?

A. I am going to tell you right now. So I put my crutches down. The clerk says, "Well, it is late now. You come back tomorrow morning."

Mr. Crawford: Your Honor, I object to any conversation with some clerk.

The Court: Just tell us what was said.

Q. With Suessmuth, and nobody else.

A. I went up the next morning to the Bull Line office. They put me in a taxi, sent me up to 45 Broadway. When I went there there was gentlemen there with me and I came back. I was introduced to Mr. Suessmuth and he said, "Tell us about the investigation of the case." And so I

told him. He took the investigation, and next day he gave me an envelope with a plain sheet of paper. He says, "All right, you take that and tomorrow you go to the Cumberland Street Hospital and get your discharge and bring it here and I will take it up with the company and see what they will do for you." The investigator said he will see [fol. 292] what he could do. That morning I was getting ready, about nine o'clock. I said I had something to do to get a transcript and I had no money to take a taxi. He rang the phone. The landlord says "Who is that?" He says "I want to speak to Redman." I went to the phone. He says "I am Suessmuth." I came over. I says, "Hello." He says, "Don't go to the hospital yet. Wait until I come and I will take you over there." He says, "We will go to the Cumberland Street Hospital after that, after the talk." I said, "All right." He said, "I will get a taxi." He says, "Where is there a notary public around here?" I says, "I don't know." So someone informed him as to a notary public, a notary public down in Stone Street. So we went up to Brown, this notary public, and he says, "Well, I want to get a paper for this man for the hospital." He says, "Have you any discharge?" I said, "Yes, sir." And he took my discharge from one of the ships I had and showed it to him. He took the taxi, he went over there. He had the card and I was along with him and I was downstairs in the sitting room with the papers and the lady gave me my discharge. Well, I had that.

He went up to the record room, I guess. He looked the record over and then he was up there about three-quarters of an hour. I was tired waiting. I went to find out myself. After that he said, "We will go up to the office." We come over the 39th Street Ferry and from there took a taxi. We took a taxi and went back up to 45 Broadway and I gave him the statements. One I told the Court and the jury heard what I said.

He said, "O. K." He said "I will take it up with the company and see what they will do for you, because it is [fol. 293] so bad when a man loses his leg and he had no family and nothing and you will hear from me." So, I never did hear from him, so I wrote that letter.

So, after I had given him that statement he come right away, and he said "All right, everything is O. K. now. Now, I will look after you." He said, "Sign right here." And he didn't give me a chance to read it.

Mr. Crawford: If your Honor please, I don't think he ought to go on.

Mr. Graves: We rest, unless you have some cross examination.

Cross-examination.

By Mr. Crawford:

Q. You did go to Mr. Suessmuth's office before you ever went to the hospital with him, didn't you?

A. Yes, sir, the Bull Line sent me there.

Q. And you went there?

A. Yes.

Q. And you told them about the case, at that time, did you not?

A. I told him about the case, yes, sir, the same thing. The record will tell——

Q. And there was a stenographer there, wasn't there?

A. Yes, there was a stenographer there.

Q. And the stenographer took down what you said, didn't she?

A. I told him. He told the stenographer.

Q. He told the stenographer and she put it down?

A. Yes.

Q. But he told the stenographer just what you told him?

A. Yes. I don't know if it was right after it was written, but he didn't give me a chance to read it after. I never at all had—I didn't see what he put into it.

[fol. 294] The Court: Is he is court?

Mr. Graves: I can recall him, if your Honor wants him.

The Court: The only question I meant to ask him is whether he ever got any consideration from anybody in this case.

Mr. Graves: The plaintiff?

The Court: The plaintiff or defendant.

Mr. Crawford: Whether Mr. Suessmuth did?

The Court: Whether this man ever got any consideration from anybody for any services rendered.

I think you better have him here and the Court be told in good faith whether he was paid and received any consideration directly or indirectly from any source for any serv-

ices in this matter. I would like to know that. I think it is important.

Are both sides finished?

Mr. Crawford: That will be the only testimony taken on Monday.

Mr. Graves: The plaintiff rests.

(Plaintiff rests.)

Mr. Crawford: Defendant rests.

(Defendant rests.)

The Court: If I get that testimony you will have twenty minutes to sum up; which I think will be the first thing on Monday morning.

(Adjourned to Monday, March 27, 1933, at 10:30 o'clock A. M.)

[fol. 295] New York, March 27, 1933, 10 A. M.

(Trial Resumed).

STIPULATION AS TO ARRIVAL OF VESSEL, ETC.

Mr. Crawford: If the Court please, instead of recalling this witness, counsel have agreed to enter into a stipulation which I think will cover your Honor's question, and that is that Mr. Suessmuth was working for an agency who were the adjusters for the defendant. Mr. Graves wants the stipulation on the record.

Mr. Graves: I consent to that.

Mr. Crawford: Mr. Graves wants the stipulation on the record that the vessel arrived in Brooklyn at 10:05 A. M. on the morning of February 12, 1930, which I agree to.

MOTION TO DISMISS, ETC.

I renew my motion made to dismiss the complaint at the end of the entire case and ask for the direction of a verdict in favor of the defendant.

The Court: I will reserve my decision on that.

Juror No. 6: May I ask a question of the plaintiff?

The Court: You should have asked that before. The juror wants to know whether he can ask the plaintiff a question.

Mr. Graves: We consent.

Mr. Crawford: We consent.

The Court: Both sides consent that he may.

Mr. Crawford: Yes.

Mr. Graves: Yes.

The Court: Call the plaintiff up here. You should have [fol. 296] done that before they rested. I tell you that for the benefit of the future.

DONALD REDMAN, recalled.

By Juror No. 6:

Q. Mr. Redman, was the ladder that leads up to the galley, was that a fixture of the bulkhead, or did it extend at an angle?

A. A fixture of the bulkhead, to come on the deck.

Q. How thick and what was the color of the rail that you grasped when you stumbled?

A. The rail is about twice the size of this iron rail, like that (indicating).

Q. Was it bigger than your wrist? About how thick in diameter?

A. About the size of the wrist.

Q. What color was it?

A. It was painted black.

Juror No. 6: That is all.

Mr. Crawford: May I ask this: I have had an urgent call to Texas and I am leaving on a plane that leaves at 12:30 from Newark. If I have to disappear, I hope you will excuse me. My assistant here can handle the case from then on.

(Mr. Crawford summed up to the jury on behalf of the defendant.)

(Mr. Graves summed up to the jury on behalf of the plaintiff.)

(During Mr. Graves' summation Mr. Crawford left the court room and was represented by Mr. William R. Meagher.)

[fol. 297] (Plaintiff's requests to charge are as follows:)

PLAINTIFF'S REQUESTS TO CHARGE

I. If the jury believe that any witness has knowingly, intentionally and wilfully testified falsely as to a single material fact, they may disregard his entire testimony.

II. The plaintiff as a seaman did not assume the risk of injury on account of the negligence of any co-employee on board said vessel, irrespective of the fact of whether or not such co-employee was a superior officer.

III. Every person employed by the defendant on board said vessel for the purpose of directly or indirectly assisting in the navigation thereof, was a co-employee of the plaintiff and this classification includes every member of the cooks' and stewards' department.

IV. The burden is on defendant to show that plaintiff was guilty of contributory negligence.

V. If the jury believe that the plaintiff was guilty of contributory negligence, that fact in itself would not be a bar to a verdict in plaintiff's favor, providing that the jury also find that the negligence of the defendant or its other employees on board said vessel contributed to the accident; and if the jury find that both the plaintiff and the defendant were guilty of negligence which contributed to the happening of an accident which resulted in the loss of plain-
[fol. 298] tiff's leg, then the jury must apportion the damages according to the comparative degree of negligence of the respective parties. For example: if the plaintiff has been and will be damaged to the extent of a given sum of money, a verdict based on said amount shall be reduced in proportion to the degree by which plaintiff's own negligence may have contributed to the happening of the accident, as compared to the degree of defendant's negligence.

VI. If the jury find that the plaintiff's foot was punctured or lacerated by a nail through the negligence of the defendant, and substantially in the manner claimed by the plaintiff, and that such initial injury was a competent, producing cause of gangrene, which necessitated the amputation of plaintiff's leg, they may award him damages for the loss of such leg according to the rules otherwise

laid down by the Court, even if at the time of the initial injury the plaintiff may have been suffering from a disease which may have contributed to the gangrene.

VII. The jury shall not allow themselves to be prejudiced by the mere fact that plaintiff may have been suffering from a loathsome disease (at the time the accident occurred).

VIII. It was the duty of the defendant to furnish plaintiff with a reasonably safe place to work and a reasonably safe means of passage to and from his sleeping quarters, and to keep the same in such condition at all times, free [fol. 299] from dangerous obstructions, and properly lighted during hours of darkness.

IX. It was the duty of the defendant to promulgate and enforce proper rules for the keeping of any and all passageways necessarily used by members of the crew, in a reasonably safe manner, free from obstructions, and properly lighted during hours of darkness.

X. It was the duty of the defendant to cause such inspections to be made from time to time which might reasonably be necessary under all the circumstances, for the purpose of keeping any passageway necessarily used by members of the crew, free from dangerous obstructions, and properly lighted, and to warn the plaintiff of any changes made therein which might be dangerous and which were unknown to plaintiff.

XI. That if the jury find that the plaintiff suffered an injury substantially in the manner as claimed by plaintiff, and such injury was the competent, producing cause of gangrene which resulted in the loss of his leg, he is entitled to receive the expenses of his maintenance and cure for a reasonable period of time after leaving the hospital, even if the defendant was not negligent and even if plaintiff's own negligence was the sole cause of his injury.

XII. If the jury find that the plaintiff is entitled to damages other than for mere maintenance and cure, i. e., on account of defendant's negligence, they may award him such [fol. 300] damages as will reasonably compensate him for his pain and suffering for the injury itself, and any permanent effects thereof, and any inconvenience necessarily

caused thereby, together with any wages which he has necessarily lost or necessarily will lose in the future on account of said injury, or such impairment of earning power as he may have sustained on account thereof; in such case such damages shall be inclusive of his maintenance and cure and necessary expenses incidental thereto.

XIII. The plaintiff had a right to assume that defendant would furnish him with a reasonably safe means of passage to and from his sleeping quarters, and had a right to rely on the defendant's performing its duty towards the plaintiff in that respect.

XIV. The plaintiff, being a seaman, was bound to obey orders of any other seaman on board said vessel to whom defendant had delegated authority to issue orders in connection with his work and his conduct on board said vessel.

XV. It is not necessary for the plaintiff to prove beyond a reasonable doubt that his injury was sustained through defendant's negligence in order to entitle him to receive a verdict for damages, but he is only obliged to establish that fact by a fair preponderance of the credible evidence; likewise, the burden is on the defendant to affirmatively [fol. 301] establish the defense of contributory negligence either as a complete or partial defense in mitigation of damages by a fair preponderance of the evidence.

XVI. The term "fair preponderance of evidence" does not necessarily mean the greater number of witnesses, but refers to the quality as well as the quantity of the evidence, written or oral, whether adduced by plaintiff or defendant.

XVII. While you may take into consideration that the plaintiff is an interested witness you are entitled to give his testimony, if you believe it to be true, the same weight as that of any other witness in whose credibility you believe, and in considering the evidence you may consider also all the probabilities of the case.

XVIII. If the jury believe that a party is intentionally withholding material evidence which it is in his power to produce, the jury have the right to infer that that evidence, if produced, would be unfavorable.

XIX. If the jury finds that the injury complained of set in operation or caused to become active a latent syphilitic condition which resulted in gangrene, the jury may find that the accident complained of was a competent producing cause of the amputation of plaintiff's leg.

XX. An employer assumes the risk of an employee having a diseased condition which may aggravate an injury, [fol. 302] and his protection is to examine or not employ an applicant for work.

XXI. When a seaman becomes sick or injured in the service of a vessel it is the duty of the shipowner, who is his employer, to provide him with maintenance and cure.

XXII. If a seaman becomes sick or injured in the service of a vessel and his employer fails to give him maintenance and cure, and such failure has aggravated the illness or injury, the seaman has his right of action for the injury thus done to him, the recovery in such circumstances including not only necessary expenses but also compensation for the hurt.

XXIII. If, while on the vessel, the plaintiff sustained an injury which required prompt and proper medical or surgical treatment and care, and the defendant was duly notified of the occurrence and such necessity for prompt and proper medical and surgical treatment and care, and failed to render or furnish the same, and if the jury believe from all the evidence that plaintiff's leg would have been saved except for said neglect or omission, they may award the plaintiff damages for the loss of said limb even if the original accident which brought on the gangrene was not caused by defendant's negligence.

XXIV. If the jury find that the defendant had designated the steward as the party to whom the plaintiff was required to report the occurrence of an accident to himself, [fol. 303] notice to said steward of such accident would be notice to the defendant.

XXV. One who causes an injury through his negligence is liable for all resulting damages though aggravated by the diseased condition of the injured party; a sickly or maimed man recovers for everything occasioned by the wrong, though he would not have suffered so much had he

been whole; and no exception to the rule should be made in a case where a plaintiff's diseased condition is the result of his own vicious or immoral conduct.

XXVI. One who negligently inflicts a personal injury on another is responsible for all ill effects which, considering the condition of health in which the plaintiff was when he received the injury, naturally and necessarily follow such injury. Hence a defendant's liabiltiy is in no way lessened or affected by reason of the fact that the injuries would not have resulted had the plaintiff been in good health, or that they were aggravated and rendered more difficult to cure by reason of the fact that he was not in good health; in other words, if the presence of disease or existing physical condition aggravates and prolongs the injury and correspondingly increases the damages, such increased or added damages may be recovered. Nor can it be shown in mitigation of damages that the plaintiff's previous habits had been such as to lessen the probability of his complete recovery or to prolong or aggravate the suffering caused by his injury.

[fol. 304] (Defendant's requests to charge are as follows:)

DEFENDANT'S REQUESTS TO CHARGE

1. The testimony is undisputed that Redmond was suffering from a dry gangrene and if you believe the testimony of plaintiff's witness Dr. Wykle and defendant's medical witnesses that dry gangrene never results from an infected wound then you must find for the defendant.

2. The testimony of the medical witnesses is undisputed that there was no evidence of a wound on Redmond's foot and if you believe the testimony of plaintiff's witness Dr. Wykle and defendant's witnesses that a wound 1½ inches long received on February 13, 1930 producing an infection sufficient to cause gangrene would be visible on examination made in the Cumberland Hospital on February 22, 1930, and thereafter, then you must find for the defendant.

3. If you do not believe from plaintiff's testimony that he cut his foot on February 13, 1930, you must find for the defendant.

4. If you believe that any witness has testified falsely as to any material fact, you may disregard his entire testimony.

5. You may take into consideration in weighing the testimony the interest of any witness in the result of the case and I charge you that the plaintiff Redman is an interested witness.

6. The mere fact that plaintiff may have been injured does not entitle him to recover damages unless he estab- [fol. 305] lishes by a preponderance of the credible testimony 1st, that he was injured as a result of some negligence on the part of defendant, and 2nd, that the injury to his foot was the producing cause of the loss of his leg.

BONDY, J.:

7. The undisputed testimony is that plaintiff was suffering from syphilis and a resulting impairment of his arteries and if you find that the gangrene was produced by these diseases as testified by plaintiff's witness Dr. Wykle and defendant's medical witness and not by any external injury you must find for the defendant.

CHARGE OF THE COURT

BONDY, J.:

Gentlemen of the Jury: this plaintiff has brought this action to recover damages which he claims he sustained through the negligence of the defendant. The defendant denies it was negligent and it denies that the physical condition of the plaintiff is the result of any injury that the plaintiff sustained aboard the ship.

The issue is a simple one: was the defendant negligent, and if so, was the negligence the proximate cause of the personal injuries which the plaintiff sustained?

The burden is on this plaintiff to prove by a preponderance of evidence both negligence on the part of the defendant, and also by a preponderance of the evidence that the injuries which he sustained were the proximate result of the negligence. So, gentlemen, if you find that on those [fol. 306] issues the evidence is evenly balanced, your ver-

dict should be for the defendant. If you find it preponderates however slightly in favor of the plaintiff, your verdict should be for the plaintiff. If you find that the evidence preponderates in favor of the defendant, however slight it may be, your verdict should be for the defendant.

It was the duty of this ship and the people in control of the ship to not only furnish the plaintiff with a safe place in which to work, but it also was the duty of the ship to use reasonable diligence in keeping the way from his quarters to the place where he had to work in a reasonably safe condition. If the defendant failed to use reasonable diligence in keeping the way in a reasonably safe condition, it was negligent. If the defendant did use reasonable diligence, it has done its full duty by the plaintiff.

You have heard the plaintiff's story. You have heard him say that about a quarter of five on February 13, in the morning, while it was dark and misty, he left his sleeping quarters to go up to the galley; after he had passed partially over the main deck to mount a ladder he stumbled over some broken boxes; that he saved himself from falling by grasping the rail; at the time he pulled a slab from his foot; there was a nail in the slab. He threw it away. There was nobody present. He went up to the galley. After he had been there he looked and saw a scratch about, I believe, an inch or an inch and a half long; that the foot bled and he put back his stocking. He did not tell anybody. Nobody was around there, neither the watchman nor anybody else. He did not tell anybody about it. He went about his work that day. I believe the next day he did tell the steward and the steward told him he would [fol. 307] get some liniment, which he did not do. They left the ship and he got some liniment, and he stayed over night at some place in Brooklyn, intending to sail the next day when the ship sailed; he went to the pier and when he got there the ship had left. Nine days afterwards he went to a hospital. He did not tell anybody on the ship nor did he tell the doctors that he had scratched his foot. He made statements. They did not contain any statement that he had scratched his foot or that his foot bled. He stayed in the hospital, where they operated around the artery—scraped his leg, and subsequently his leg was amputated.

All the doctors agree that his leg had to be amputated because he had gangrene. Some say he had dry gangrene.

Some doctors say that dry gangrene is not brought about by any external accident. Others say that it may be caused by external accident. It is conceded that he had syphilis. Certainly that does not deprive him of any rights, if his condition is due to the negligence of the defendant. Some doctors say the syphilis contributed to the injury; others say that it could not.

The issue is: did the defendant fail in its duty to keep that deck reasonably safe for Redman to have passed over it? You must consider whether he is telling the truth when he said the passageway was unlighted, and that this was the first time that he was on the ship that he had found it unlighted at that time of day. You must say whether or not he is telling the truth when he says he stumbled over broken boxes and whether or not he was scratched by the nail, and further if you find that the defendant was negligent and you find that the ship did not use reasonable care [fol. 308] in keeping that place free of all broken boxes and debris, and you find the defendant was negligent, then you must also find whether or not the condition which he is in today was due to that negligence. Certainly if the condition he is in today is due to his physical condition and not due to external injury, the defendant is not responsible. If it is due to an external injury, an old external injury is the proximate cause of the condition in which he is in, then he is entitled to recover; if the defendant was negligent, and if the negligence was the proximate cause of his condition, then the defendant is liable, notwithstanding the fact that he is conceded to have syphilis.

You, gentlemen, are the sole judges of the facts. That means that you must pass upon the credibility of the witnesses. In passing on their credibility you may take into consideration the interest of the witnesses, in the result of the action, the story they tell, the way in which they tell that story, the probability of their story being true.

You may take into consideration the fact that the plaintiff is interested in the result of this action. You may take that into consideration, and believe him, as far as you think he should be believed. It is for you to say whether or not you believe his story. It is for you to pass upon the credibility of the expert witnesses in the giving of their opinion.

In a State Court, in which some of you gentlemen may have acted as jurors, the contributory negligence of a

plaintiff deprives him of relief. In the Federal Court the rule is different. If the owner of a ship or those in control of the ship or any of their servants are negligent, the plaintiff is entitled to recover, whether or not his own negli- [fol. 309] gence contributed to the injury. The rule of damage, however, is that the damage must be reduced in proportion, that his negligence contributed to the injuries, taking into consideration also the defendant's negligence. Maybe I can make myself clear. If you find that the defendant was negligent or any of its servants were negligent, and that the plaintiff was equally negligent, and there was contributory negligence, that does not deprive the plaintiff of the right to recover, as it would in the State Court, but in such case you ascertain what the damages are and you award him one-half those damages; that is, the proportion that his own negligence contributed to the injury. If you find that he was twice as negligent as the defendant, after having ascertained the amount of his damages, he would be entitled to one-third of those damages. If the defendant was twice as negligent as the plaintiff, he would be entitled to two-thirds of the damages which he sustained. I hope I have made the comparative negligence rule plain to you in a general way.

If you find that the plaintiff has proven beyond a reasonable doubt that this defendant or any of its servants were negligent, and the negligence was the proximate cause of the condition which he has described, then you must pass upon the question of damages. You must ascertain what amount of money would compensate him, so far as it is possible to compensate him with money. You may take into consideration the fact that he has lost his leg. You may take into consideration the pain that he has suffered, both during the operation and at other times. You may take into consideration the wages that he has lost and the wages [fol. 310] that he will continue to lose in the future through the injury and disability.

In other words, you may take into consideration the extent to which his earning powers have been impaired by these injuries.

After you have ascertained the amount of the damages, it is for you to determine whether any of his own negligence contributed to the injuries. If they did, you must apportion those damages as the court has indicated.

There is another principle of law to which the attention of the jury should be drawn. It is the duty of the ship owner to supply to every member of the crew injured on the ship, whether negligent or not, with maintenance and cure for such time as may be necessary to bring about the best cure possible under such circumstances. Are there any further requests to charge?

Mr. Graves: The second part of the action, on the question of neglect——

The Court: I thought I just did. Gentlemen, whether a sailor or a ship owner is negligent or not, in this Court it does not become an important question with reference to teh right of maintenance and cure. In other words, the plaintiff is entitled in any case to reasonable maintenance or to the expense of maintaining him and expense of curing him while he is undergoing the best cure that can be given to him. I will charge you that in this case, if I remember right, there is no evidence as to the fact that he has expended anything personally for maintenance or that he has expended anything for cure. Am I right about that?

Mr. Graves: The affidavit that they got from the plaintiff —they have got a statement to the effect that the Kings County Hospital informed them it would be one year be- [fol. 311] fore the stump could be healed. It was not offered in evidence, but that is the testimony on that point.

The Court: Let me have it. Point it out.

Mr. Graves: And also as to the cost of the legs.

The Court: Just mark what you want, and I will charge it to the jury. Mark it.

Mr. Graves: The middle of the page (indicating).

The Court: You want me to charge the jury it would be at least a year before the stump would be properly healed?

Mr. Graves: Yes.

Mr. Meagher: Mr. Graves has attacked that statement. As I understand it, he does not stand on that statement. He has attacked it throughout the trial.

The Court: There is no evidence in the case of any expenditures by the plaintiff. In other words, for one year it shows he was in the public hospital.

Mr. Graves: And the statement it would take a year after that——.

The Court: Pardon me?

Mr. Graves: One year after he left the Kings County Hospital. They introduced it.

The Court: I so charge.

Mr. Graves: If they believe it, they can use it, even though it——

The Court: There is no evidence here that it will take one year or two years to heal. As to what the further maintenance will be or the expense of cure, you are not entitled to speculate. There is no evidence of what it would cost to maintain him or cure him. So far as the evidence shows, none was produced in the case. You cannot speculate. If [fol. 312] there was any such evidence, it should have been offered. I have given you what I remember. You are not to be influenced by my recollection. I may have misstated it. In arriving at your verdict you should be guided entirely by your own recollection, not by the Court's recollection of the facts.

Mr. Graves: I request that you charge the 26th request.

The Court: Take an exception.

Mr. Graves: I except.

The Court: To what do you except?

Mr. Graves: To the last charge. Now the 26th request.

The Court: Take your exception first.

Mr. Graves: I did except.

The Court: To my charge; any further exceptions to my charge?

Mr. Graves: I except to your Honor's refusal to charge the other requests.

The Court: I have not refused to charge them. To what part?

Mr. Graves: That there is no proof that the plaintiff had to spend money. If the man has to spend a certain amount of money for a year, he cannot live on nothing.

The Court: They might speculate.

Mr. Graves: They could certainly arrive at the minimum.

The Court: There is no proof of the minimum. Gentlemen, if there is any proof as to what it would cost to maintain or did cost to maintain this plaintiff, or if there is any proof as to what, if anything, it will cost or did cost to get cured, you are to take that into consideration, and you should give him that whether or not he was negligent, no [fol. 313] matter how negligent he may have been. It is

also the rule that nobody can recover, no matter how unfortunate he is, unless the jury has found and believes there is negligence in the case.

Are there any other exceptions?

Mr. Graves: No.

The Court: Any exceptions for the defendant?

Mr. Meagher: No, except one. The defendant excepts to that portion of your Honor's charge in which you state that some doctors say the plaintiff had dry gangrene, and I request your Honor to charge the jury that the medical testimony is uncontradicted that the plaintiff was suffering from dry gangrene.

The Court: I believe I was mistaken and that the testimony does show that the plaintiff suffered from dry gangrene.

Mr. Graves: I request your Honor to charge that Dr. Neustadter testified it did not make any difference whether it was dry or not.

The Court: Some doctors said external injury might cause gangrene; it makes no difference whether it is wet or dry; others say dry gangrene cannot be caused by external injury, but is due to physical conditions.

Mr. Graves: I ask your Honor to charge that one about the cause of action——

The Court: What number?

Mr. Graves: 26 (reading): "One who negligently inflicts a personal injury on another is responsible for all ill effects which, considering the condition of health in which the plaintiff was when he received the injury, naturally and necessarily follow such injury. Hence a defendant's liability is in no way lessened or affected by reason of the fact that the injuries would not have resulted had [fol. 314] the plaintiff been in good health, or that they were aggravated and rendered more difficult to cure by reason of the fact that he was not in good health; in other words, if the presence of disease or existing physical condition aggravates and prolongs the injury and correspondingly increases the damages, such increased or added damages may be recovered. Nor can it be shown in mitigation of damages that the plaintiff's previous habits had been such as to lessen the probability of his complete recovery or to prolong or aggravate the suffering caused by his injury."

The Court: Let me read it.

Mr. Graves: I have given your Honor an authority on that and quoted from an opinion. It is quoted bodily from an opinion.

The Court: I believe I have in effect so charged, and I will so charge. Certainly if the condition in which he is in today is due to that external injury and that external injury was caused by the negligence of the defendant, he is entitled to recover whether he has syphilis or not. If, however, the condition in which he is in today was caused by syphilis and not by external injury, the defendant is not responsible and plaintiff should not recover.

Mr. Graves: I ask your Honor to charge No. 2.

The Court: Read it.

Mr. Graves (reading): "The plaintiff as a seaman did not assume the risk of injury on account of the negligence of any co-employee on board said vessel, irrespective of the fact of whether or not such co-employee was a superior officer."

The Court: I so charge, although every workman assumes the risk of his employment, he does not assume responsibility for negligence of the master, and a seaman [fol. 315] does not assume the risk of the negligence of a co-employee.

Mr. Graves: I ask your Honor to charge No. 4.

The Court (continuing): In the State Court it is a general proposition of law that one is not entitled to recover for injuries caused by a co-employee. In other words, that would not be an injury by the master; he takes the risk. At common law if the injury is caused by a co-employee aboard a ship, in those cases the rule is different and the master or owner of the ship is responsible not only for his own negligence but also for the negligence of the plaintiff's co-employee.

Mr. Graves: No. 4.

The Court (continuing): A seaman does not assume the risk of negligence of his co-employee, and it shall not deprive him of recovery if there was negligence of a co-employee.

Mr. Graves: I ask your Honor to charge No. 1 of my requests (reading): "If the jury believe that any witness has knowingly, intentionally and wilfully testified falsely as to a single material fact, they may disregard his entire testimony."

The Court: I so charge. You are the sole judges of how far, if at all, you will believe any one of the witnesses.

Mr. Graves: I ask your Honor to charge No. 9 (reading): "It was the duty of the defendant to promulgate and enforce proper rules for the keeping of any and all passageways necessarily used by members of the crew, in a reasonably safe manner, free from obstructions, and properly lighted during hours of darkness."

The Court: I so charge.

Mr. Graves: I ask your Honor to charge No. 10 (reading): "It was the duty of the defendant to cause such in-
[fol. 316] spections to be made from time to time which might reasonably be necessary under all the circumstances, for the purpose of keeping any passageway necessarily used by members of the crew, free from dangerous obstructions and properly lighted, and to warn the plaintiff of any changes made therein which might be dangerous and which were unknown to plaintiff."

The Court: I believe I so charged. I will so charge.

Mr. Graves: I ask your Honor to charge No. 13 (reading): "The plaintiff had a right to assume that defendant would furnish him with a reasonably safe means of passage to and from his sleeping quarters, and had a right to rely on the defendant's performing its duty towards the plaintiff in that respect."

The Court: The Court believes it has substantially so charged, and it so charges.

Mr. Graves: I ask your Honor to charge No. 14 (reading): "The plaintiff, being a seaman was bound to obey orders of any other seaman on board said vessel to whom defendant had delegated authority to issue orders in connection with his work and his conduct on board said vessel."

The Court: The Court will so charge.

Mr. Graves: I ask your Honor to charge the jury that the plaintiff is not bound to prove his case beyond a reasonable doubt.

The Court: You understand the distinction to which I believe that request is directed. In a criminal case the Government must prove its case beyond a reasonable doubt. In a civil case a party need only prove its case by a preponderance of the evidence. By preponderance of the

evidence is not meant the number of witnesses, but the entire effect of all of the evidence.

[fol. 317] In other words, it relates to the quality and substance of the evidence, no matter whether one or the other party call more or fewer witnesses.

Mr. Graves: I ask your Honor to charge No. 18 (reading): "If the jury believe that a party is intentionally withholding material evidence which it is in his power to produce, the jury have the right to infer that that evidence, if produced, would be unfavorable."

The Court: The Court so charges. The Court will charge further with reference to this matter that the accident took place around five o'clock in the morning, and the plaintiff himself said there was nobody there who saw the accident but he himself.

Mr. Graves: I ask your Honor to charge No. 20 (reading): "An employer assumes the risk of an employee having a diseased condition which may aggravate an injury, and his protection is to examine or not employ an applicant for work."

The Court: I think that has been substantially charged. I so charge.

Mr. Graves: That is all.

Mr. Meagher: I ask your Honor to charge No. 1 (reading): "The testimony is undisputed that Redman was suffering from a dry gangrene and if you believe the testimony of plaintiff's witness Dr. Wykle and defendant's medical witnesses that dry gangrene never results from an infected wound then you must find for the defendant."

The Court: I believe that substantially was charged. I will so charge.

Mr. Meagher: I ask your Honor to charge the jury that: "The testimony of the medical witnesses is undisputed that there was no evidence of a wound on Redman's foot and if you believe the testimony of plaintiff's witness Dr. Wykle [fol. 318] and defendant's witnesses that a wound 1½ inches long received on February 13, 1930, producing an infection sufficient to cause gangrene would be visible on examinations made in the Cumberland Hospital on February 22, 1930, and thereafter, then you must find for the defendant."

The Court: I so charge.

Mr. Graves: I take exception to that.

Mr. Meagher: I ask your Honor to charge the jury: "The mere fact that plaintiff may have been injured does not entitle him to recover damages unless he establishes by a preponderance of the credible testimony 1st, that he was injured as a result of some negligence on the part of defendant and 2nd, that the injury to his foot was the producing cause of the loss of his leg."

The Court: I so charge.

Mr. Meagher: I ask your Honor to charge the jury (reading): "The undisputed testimony is that plaintiff was suffering from syphilis and a resulting impairment of his arteries and if you find that the gangrene was produced by these diseases as testified by plaintiff's witness Dr. Wykle and defendant's medical witnesses and not by any external injury you must find for the defendant."

The Court: I believe I so charged, and I do so charge now.

Mr. Meagher: I ask your Honor to make this additional charge: if you do not believe from the plaintiff's testimony that he cut his foot on February 13, 1930, you must find for defendant.

The Court: I will so charge.

Mr. Graves: I ask your Honor to charge the jury in connection with that charge to the jury just now that they make take into consideration the testimony of Dr. Neu- [fol. 319] stadter and Dr. Charache that these blisters may have obliterated the original signs of the injury.

The Court: You may take all the doctors' testimony into consideration in arriving at a verdict.

Mr. Graves: I think the jury——

The Court: If you find that the doctors did testify as the Court was requested to charge, then you may take those facts into consideration.

Mr. Graves: And the jury is instructed to use their own recollection of the facts in determining the facts, not the statements of counsel.

The Court: The statements of counsel are not evidence but the evidence is the sworn testimony given by the witnesses.

(The jury retired at 12:20 P. M. to consider their verdict and afterwards were sent out to lunch at 1:15 P. M.)

The Court: I have a communication from the jury which says that one of them complains of indigestion and would like to get something for it. Maybe the Marshal will take him out.

Mr. Graves: I have no objection.

Mr. Meagher: I have no objection.

The Court (to the Marshal): If he will let you know what he wants, get it for him. They must be kept together. They should be kept together. We never let them separate.

VERDICT

(At 3:53 P. M. the jury returned to the court-room and announced that they found a verdict for the plaintiff in the sum of $5,000.)

Mr. Meagher: At the close of the plaintiff's case a motion was made by the defendant to dismiss for lack of proof and your Honor reserved decision on the motion. May we have a ruling on it now?

[fol. 320] The Court: How long a time do you want to submit a brief?

Mr. Meagher: At the close of the entire case a motion was made for the direction of a verdict for the defendant. Will your Honor rule upon that motion now?

The Court: I will deny that motion.

MOTION TO SET ASIDE VERDICT

Mr. Meagher: Your Honor, the defendant moves that the verdict rendered by the jury be set aside as contrary to the law and contrary to the weight of the evidence.

The Court: Motion denied.

Mr. Meagher: May the defendant have an exception to the denial of both motions?

The Court: Yes.

Mr. Meagher: You reserved decision on a motion to dismiss for insufficient proof.

The Court: Yes.

Mr. Graves: You will take the motion up on briefs?

The Court: There was sufficient to go to the jury. I will deny your motion now and give you an exception.

[fol. 321] PLAINTIFF'S EXHIBIT 1

October 28th, 1932.

Mr. G. Ramsey, 6 Hanover Street, Charleston, S. Car.

DEAR SIR: I am the attorney for Donald Redman in the matter of his claim for personal injuries sustained on board the Steamship "Frances Weems" on or about February 13th, 1930. His case will be coming up for trial very shortly.

Will you kindly send me a statement as to what you know in regard to the matter, and oblige

Yours very truly, —— ——.

FRG:FHM.

PLAINTIFF'S EXHIBIT 2

Nov. 2/32
Charleston S C
#6 Hanover St

Mr Frede. R. Graves
dere Sire

you letter of oct 28 Has Bin Reseave and was understud about the case of RedMan
i no Him and He work with me in Feb 1930 and now what Hapen to Him and you say fore me to send you a statement i would rither Be there my self what tim will His case call. But it will cost me to mutch and i Havent got any [fol. 322] money so what you will do about that i cant send no statement i would Rither Be there so No More to Say and till i Here from you

from yours truly

Geo Ramsy.

(Envelope:)
(Cancelled 3c stamp.)
Postmark: Charleston Nov 2 7 30 PM 1932 S. Car.
Mr. frederick. R. Graves
44. White Hall St
New York City

(Back of envelope:)
if not del Ret to. 6. Hanover St Geo Ramsy

PLAINTIFF'S EXHIBIT 3

November 4th, 1932.

Mr. George Ramsey, 6 Hanover Street, Charleston, S. Car.

DEAR SIR: I am in receipt of your letter of November 2nd, 1932, and in reply beg to state that Donald Redman's case will not come up for trial for several weeks yet. I [fol. 323] note your statement that you cannot afford to come to New York, but of course if I decide to call you as a witness, we would defray the expenses of the trip. However, I wish that in the meantime you would write and let me know what you recall in regard to the case.

Redman states that on the early morning of February 13th, 1930, while walking along the after deck of the vessel going from his quarters to the galley, he stumbled over some broken boxes and ran a nail into his foot, which thereafter became inflamed, resulting in gangrene which resulted in the amputation of his leg. He states that the vessel was then lying at her pier in Brooklyn, and that he reported the accident to you and that you recommended liniment and went ashore with him for the purpose of assisting him to purchase the same, prior to his leaving the vessel. He also states that the deck was dark at the spot where the accident happened. I should be glad to have you write and tell me what your own recollection is in regard to the occurrence in question.

I frequently have occasion to run down to Washington, and may have to go there again in the near future, in which case I shall make an effort to continue on to Charleston for the purpose of interviewing you in person. In the meantime, I would be glad to have you give me some definite information as to what you recall in regard to the accident.

Trusting that you will favor me with a prompt reply, I remain

Yours very truly, —— ——.

FRG:FHM.

[fol. 324] PLAINTIFF'S EXHIBIT 4

January 9./1933,

I was stoward on the francis weems Feb. 1930 and Redman was 2n. cook at that time.
i do not Remember about any Boxis on the deck.
i get two letters from Mr Graves lawyer for Redman and answere one
i and Redman went ashore to gather

Geo Ramsy.

PLAINTIFF'S EXHIBIT 5

Jan 10/1933
Balto Md
125. Market Place

Mr Grove dere Sire Just a few line to let you Here from us Now Mr. Grove. we think this mater over and now you must consider us so By that we will do any thing in you Power over toward this mater now let us no what you will do and if you want us let us no and now But i think it is Best for us to meat in Cownsel as soon as Posauble thease Peapil cant do any nuthing for us so if we can do any thing to Help you and you Help us But you must give us a Brake and How mutch
So no More to say and till we Here from you then i will tell you the Rest from Geo Ramsy
and James Albert
same adress
James is get Sum
good news for you
answer soon

[fol. 325] (Envelope:)
(Cancelled 3c stamp.)
Postmark: Baltimore, Md Jan 10 2—PM 1933.
Mr frederick. R Grove
counselor at law
#44 White Hall St
New York Room. 1114

(Back of envelope:)
if not Rts Ret to #126 Market Place Balto Md. Geo Ramsy

DEFENDANT'S EXHIBIT A

March/12/1931.

Mr. R. O. Sussmuth:

I am addressing this letter to you for a liftle information consisting my case with the Bull Line v. Donald Redman. I think it is sufficient time to get a reply so I left it to you as you is representing the Bull Line. I only want to know what is their intention toward me because I am crippled by their ship and unable to work right now and with your idea a one leg man can't work without some assistance. So I have nothing more in my mind right now. So if you please send a reply back so if not I am seeking further investigation.

Donald Redman, 32 Hamilton Ave., Brooklyn, N. Y.

[fol. 326] DEFENDANT'S EXHIBIT B

SS "Frances Weems"—Alleged Injury to Donald Redman—Feb. 14th, 1930

STATE OF NEW YORK,
County of New York, ss:

Donald Redman, being duly sworn, deposes and says:

My name is Donald Redman am 38 years of age and reside at #32 Hamilton Avenue, Brooklyn, N. Y. I went to sea as a cook from 1915 until February 1930. I was employed on the SS "Frances Weems" of the Bull Line from about January 12th, 1930 until February 14th, 1930 as cook. During the month of February while the vessel was lying at the Bull Line Pier in Brooklyn, I was engaged in my duties as cook. At this time I was assisting in carrying stores on board. The weather was bad and it was raining. The steward, Mr. Ramsey and two messboys were also assisting in this work. I do not remember the messboys' names. I was assisting in this work from about 1:00 P. M. until about 3:00 P. M. While so engaged my left foot began to pain me. The stores were distributed in various storerooms, the meat, etc. going into the ice box. I did not injure my foot while engaged in this work nor at any time while I was on the vessel.

On February 14th, 1930 I signed articles for a trip to San Domingo and on February 15th, 1930 the ship sailed. On the morning of February 15th, however, my left foot had become so swollen that I could not get my shoe on, therefore, I had to get off the ship. On the night of February 14th, 1930 at about 8:00 P. M. I went ashore with the steward, George Ramsey. We went to Fulton Street, Brook-
[fol. 327] lyn to a barber and then bought some tobacco. Before going ashore, however, I told Ramsey that my left leg pained me and I asked him what he thought was good for it. He told me that he did not know, but suggested liniment. I did not receive any treatment on the vessel for my foot, although I asked Ramsey for it. On the morning of February 14th, 1930 I was examined by a doctor from the Bull Line, who passed me as fit for duty. I did not return to the ship on the night of February 14th, 1930 but stayed in a rooming house on Hudson Place, Brooklyn, N. Y. The next morning on February 15th, 1930 I arose at 6:00 A. M. and found my left foot badly swollen. I took a taxi to the Bull Line Pier where the vessel was lying. I told Ramsey, the steward that I could not make the trip as my foot was badly swollen. I packed my clothes and left the vessel. I went to #32 Hamilton Avenue, Brooklyn where I stayed until February 20th, 1930. During this time my ankle was getting worse and I received no medical treatment for it, with the exception of some Sloans Liniment which I bought myself. On February 20th, 1930 the land lord of the rooming house at #32 Hamilton Avenue called for an ambulance and I was taken to the Cumberland Street Hospital in Brooklyn. I was admitted to this hospital on February 21st, 1930, and remained until June 4th, 1930. On April 17th, 1930 my left leg was amputated below the knee.

The room I occupied on the ship was aft under the poop and was occupied also by a saloon messman and the crews messman. The room was very cold when I was in it as just as soon as the ship arrived in New York, we had no steam heat as it was shut off by order of the Chief Engineer. The
[fol. 328] room had a steel deck with no floor covering and was very cold. My bunk was the upper one and was against the ship's side. I do not remember whether there was any sheathing over the ship's side or not but believe there wasn't anything over the bare iron. I was furnished with two blankets and bed linen. I was in this room about three

hours a day and used to turn in about 10.00 P. M. I could not walk around very much in the room as it was too small, but I used to sit around about an hour or two before turning in. While sitting around I always had my shoes or slippers and socks on my feet. My shoes and slippers and socks were in good repair. While carrying stores in February of 1930, I have already stated that it was raining. I did not have rubbers on my feet and they became a little bit wet, but not enough to bother me right away. I did not put any heavy clothes on to go out on deck. I do not know what caused my leg to become infected or the reason for it.

Before joining the SS "Frances Weems" I was employed on the SS "Georgiana Weems" during November and December of 1929, on the SS "Jean Weems" from April 1929 to May 1929. From May 1929 to November 1929 I was not employed on any vessel, but stayed ashore at Baltimore. I was on the SS "Arlyn" from February 1929 until March 1929. All these ships were operated by the Bull Line. I came from San Pedro, California in December, 1928. I had been employed as second cook on the "Larry Doheny" for about four months and was paid off in Baltimore on January 8th, 1929.

Previous to February 14th, 1930 I had not been ashore in Brooklyn as we had just come from Alexandria, Va. While ashore with Ramsey on the night of February 14th, 1930 I [fol. 329] did not drink any intoxicating liquors. I have never had a venereal disease in my life. I was on the SS "West Irmo" of the American West African Line (Bull) in 1927 but do not remember the dates. I was passed by the Sea Service Bureau at New York at this time and found fit for duty. Previous to February 12th, 1930 I never had any trouble with my feet, particularly the left. It was on this date February 12th, 1930 that my left foot began to pain me in the ankle and then went to my toes. At this time, as I have stated before, I was on the vessel engaged in my regular duties as cook.

After my discharge from the Cumberland Street Hospital I was sent to the Kings County Hospital, where I remained until February 21st, 1931 when I was discharged and was told that it would be at least a year before the stump would be properly healed.

On February 14th, 1930 when I signed articles for a subsequent voyage I was examined by a doctor of the Bull Line, but he did not look at my feet or legs. I did not tell

this doctor that my left foot pained me. As a matter of fact I did not tell any one about my foot but the steward, George Ramsey. As my condition was caused while in the service of the SS "Frances Weems", I think I ought to be paid by the Bull Line for the loss of my leg, as I am permanently disabled and will never be able to follow my profession as a cook on board steamships. My pay as a cook on the SS "Frances Weems" was $60.00 per month. I am at the present time destitute and have borrowed a considerable amount of money from friends. I need money now on which to live.

While I was in the Cumberland Street Hospital, n lawyer [fol. 330] by the name of Sanford C. Nussenfeld of #371 Fulton Street, Brooklyn solicited my case. I told him that I did not want to bother with any attorneys, but that I would consult the Bull Line first and see what they would offer.

I am a British Subject, colored, having been born in Barbadoes, West Indies. I took out my first papers to become an American Citizen in 1923 but have not as set secured my final papers.

Donald Redman.

Sworn to before me this 5th day of March, 1931. William M. Hudson, Notary Public. Queens Co. Clk's No. 2349. Register's No. 6724. New York Co. Clerk's No. 557. Kings Co. Clerk's No. 114. Commission expires March 30, 1931. (Seal.)

DEFENDANT'S EXHIBIT C

Additional Statement

S. S. "Frances Weems"—Alleged Injury Donald Redman—Feb. 14th, 1930

On February 14th, 1930 I told Geo. Ramsey the steward that my left foot pained me. I asked him what he thought was good for it. He told me he did not know what to give me, but suggested linament.

I did not report to the master of the vessel, as my foot did not feel very bad. I did not receive any treatment on

[fol. 331] the ship for my foot although I asked Ramsey for it.

Before joining the "Frances Weems" I was on the "Georgiana Weems" during November and December 1929, on the "Jean Weems" from April 1929 to May 1929. From May 1929 to November 1929 I was not employed on any vessel but stayed ashore at Canton, Baltimore. I was on the S. S. "Arlyn" from Feb. 1929 until March 1929. All these ship- were operated by the Bull Line.

I came from San Pedro California in December 1928. I had been employed as second cook on the "Larry Doheny" for about 4 months and was paid off in Baltimore on Jan. 8th, 1929.

On Feb. 14th, 1930 I went ashore with Geo. Ramsey. We went to Fulton St. to a barber and then bought some tobacco. We did not have any liquor.

Previous to Feb. 4th I had not been ashore in Brooklyn as we had just come from Alexandria Va. and I did not drink any alcohol.

I have never had a venereal disease in my life.

I was on the S. S. "West Irmo" of the American West African Line (Bull) in 1927 but do not remember the dates. I was passed by the Sea Service Bureau at N. Y. at this time and found fit for duty.

Previous to Feb. 12th 1930 I never had any trouble with my feet particularly the left one. It was on this date Feb. 12 1930 that my left foot began to pain me in the ankle and then went to my toes. At this time I was on board the vessel engaged in my regular duties as cook.

[fol. 332] After my discharge from the Cumberland St. Hospital I was sent to the Kings County Hospital where I remained until Feb. 21st when I was discharged and was told that it would be at least a year before the stump would be properly healed.

On Feb. 14th 1930 I was examined by a doctor of the Bull Line, but he did not look at my feet or legs. I did not tell this doctor that my left foot pained me. As a matter of fact I did not tell any one about my foot but the steward Geo. Ramsey.

Donald Redman.

Subscribed and sworn to before me this 5th day of March 1931. Wesley H. Morris, Notary Public, Kings Co. Clerk's No. 206, Register's No. 2251.

Certificate filed in N. Y. Co. Clerk's No. 530, Register's No. 2-M-401. Term Expires March 30, 1932. (Seal.)

[fol. 333] DEFENDANT'S EXHIBIT D

City of New York

Department of Hospitals, Cumberland Hospital

March 5, 1931.

Hosp. Chart #14501

To whom it may concern:

This is to certify that the records in this Hospital show that Donald Redmond 38 years of age, a native of British West Indies by occupation Cook and living at the time of his reception here at 1913 Lombard St., Bklyn. was admitted to the institution on February 21, 1930.

The Diagnosis in his case is Gangrene of Left Foot—Syphilis. Operations—February 24, 1930—Periarterial Sympathectomy, ligation of femoral vein—April 17, 1930—Amputation of Lower one third of the leg.

He was discharged on June 4, 1930.

Marcus D. Kogel, M. D., M. L., Deputy Medical Superintendent.

Given to Donald Redmond.
MDK:ML.

[fol. 334] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION SETTLING BILL OF EXCEPTIONS

It is stipulated and agreed between the respective parties that the foregoing bill of exceptions is true and correct and contains all the evidence received upon the trial of this action or relating to the foregoing exceptions, and may be settled and ordered on file.

Dated New York, November 6th, 1933.

Hunt, Hill & Betts, Attorneys for Defendant-Appellant. Frederick R. Graves, Attorney for Plaintiff-Appellee.

IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS AND ORDERING SAME TO BE FILED

The attorney for the defendant-appellant having tendered this as the defendant's bill of exceptions to the rulings of the Court upon the trial of this action, and having requested that the signature and seal of the trial Judge should be annexed to the same pursuant to the statute in such case made and provided; and forasmuch as none of such matters and exceptions so offered and made rulings and instructions of said Judge, and none of the evidence [fol. 335] and other matters do appear on the record of the said case, the said Judge, pursuant to said request, did put his signature and seal to this bill of exceptions on this 6th day of November, 1933, and ordered the same on file.

William Bondy, U. S. D. J.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

DONALD REDMAN, Plaintiff,

against

BALTIMORE & CAROLINA LINE, INC., Defendant

JUDGMENT

The above entitled action having been duly tried before Honorable William Bondy, District Judge and a jury and the United States District Court for the Southern District of New York on March 23rd, March 24th and March 27th, 1933, and the jury having duly rendered a verdict on March 27th, 1933, in favor of the plaintiff and against the defendant in the sum of Five thousand Dollars ($5,000), and the defendant having duly moved to set aside the verdict, for Five thousand Dollars ($5,000) for a new trial, and the Court having denied the said motion and also all other motions made by the defendant during the trial, and [fol. 336] the plaintiff's costs having been duly taxed at $42.50, now on motion of Frederick R. Graves, attorney for

the plaintiff, it is adjudged that the plaintiff recover from the defendant the sum of Five thousand Dollars ($5,000) and the further sum of $42.50 costs as taxed amounting in all to the sum of $5,042.50 and that the plaintiff have execution therefor against the defendant Baltimore and Carolina Line, Inc.

Dated New York, April 7th, 1933.

Charles Weiser, Clerk.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR ORDER ALLOWING APPEAL

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The petition of Baltimore & Carolina Line, Inc., by its attorneys, Hunt, Hill & Betts, respectfully shows:

That on April 7, 1933, this Court entered a judgment [fol. 337] in favor of the plaintiff and against the defendant, in the sum of Five thousand Dollars ($5,000) and costs and disbursements in the amount of Forty-two and 50/100 Dollars ($42.50) making in all the sum of Five thousand forty-two and 50/100 Dollars ($5,042.50) in which judgment and the proceedings had prior thereto certain errors were committed to the prejudice of the defendant, all of which will appear more in detail in the assignment of errors which is filed with this petition.

Wherefore defendant does hereby appeal from said judgment in this court to the United States Circuit Court of Appeals for the Second Circuit, and prays that this appeal may be allowed and that a transcript of the record of proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and that such other and further proceedings may be had as may be proper in the premises.

Hunt, Hill & Betts, Attorneys for Defendant-Appellant, Office & P. O. Address: 120 Broadway, Borough of Manhattan, City of New York, N. Y.

[fol. 338] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—May 15, 1933

On reading the petition of Baltimore & Carolina Line, Inc., made on its behalf by Hunt, Hill & Betts, its attorneys, dated May 11, 1933, for appeal and consideration of the assignment of errors presented therewith, it is

Ordered that the appeal herein be allowed as prayed for; and it is further

Ordered that a certified transcript of the record and all proceedings be transmitted to the Circuit Court of Appeals for the Second Circuit.

Dated New York, May 15, 1933.

C. W., Alfred C. Coxe, United States District Judge.

[fol. 339] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

The defendant in the above entitled action in connection with its petition for an order allowing an appeal assigns the following errors which it avers occurred upon the trial of this cause, to-wit:

1. That the Trial Court erred in denying defendant's motion to dismiss the complaint at the close of plaintiff's case.

2. That the Trial Court erred in denying defendant's motion to dismiss the complaint at the close of the entire case.

3. That the Trial Court erred in denying defendant's motion for the direction of a verdict in favor of the defendant.

4. That the Trial Court erred in denying defendant's motion to set aside the verdict and for a new trial.

Hunt, Hill & Betts, Attorneys for Defendant-Appellant, Office & P. O. Address: 120 Broadway, Borough of Manhattan, City of New York.

[fol. 340] Citation in usual form omitted in printing.

[fol. 341] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TERM UNTIL NOV. 6, 1933

Upon the subjoined consent and, upon motion of Hunt, Hill & Betts, attorneys for defendant-appellant, it is

Ordered, that the time of the defendant-appellant herein to file the transcript of record be and the same hereby is extended to and including the 6th day of November, 1933, and it is further

Ordered, that the term of the Court herein be and the same hereby is extended and enlarged up to and including the 6th day of November, 1933, and it is further

Ordered, that the return day of the citation herein be and the same is hereby extended to and including the 6th day of November, 1933.

Dated October 30th, 1933.

Charles Wieser, Clerk of the United States District Court for the Southern District of New York.

I hereby consent to the entry of the foregoing order and waive notice of entry thereof.

Dated October 30th, 1933.

Frederick R. Graves, Attorney for Plaintiff-Respondent.

[fol. 342] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated New York, November 6th, 1933.

Hunt, Hill & Betts, Attorneys for Appellant. Frederick R. Graves, Attorney for Appellee.

IN UNITED STATES DISTRICT COURT

ORDER FILING RECORD

On the consent of the attorneys for the respective parties the foregoing printed record is hereby ordered filed in lieu of the original papers for the purpose of certifying a record on appeal.

Dated New York, November 6, 1933.

William Bondy, U. S. D. J.

[fol. 343] Clerk's Certificate to foregoing transcript omittted in printing.

[fol. 344] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1933

No. 268

Argued January 31, 1934. Decided April 30, 1934

DONALD REDMAN, Plaintiff-Appellee,

v.

BALTIMORE & CAROLINA LINE, INC., Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, L. Hand, and Swan, Circuit Judges

Action to recover for personal injuries alleged to have been sustained by the plaintiff while employed upon the defendant's vessel. From a judgment for the plaintiff upon the verdict of a jury, the defendant appeals. Judgment reversed.

Hunt, Hill & Betts, of New York City (Geo. Whitefield Betts, Jr., H. Victor Crawford, and William R. Meagher, all of New York City, of counsel), for appellant.

Frederick R. Graves, of New York City, for appellee.

OPINION

SWAN, Circuit Judge:

The errors assigned by the defendant challenge the denial of its motions to dismiss the complaint for insufficient proof and to direct a verdict for the defendant. Hence the question presented on this appeal is whether there was any evidence to support the verdict.

The plaintiff was a colored seaman, 38 years of age at the time of the occurrence complained of. On February 21, 1930, he was taken to a hospital with gangrene of the left foot, which ultimately necessitated the amputation of the lower one-third of his leg. The theory of his suit is that the gangrene resulted from an injury sustained on February 13, 1930, by reason of the defendant's negligence in allowing the deck of its vessel, on which he was employed as a cook, to be dark and littered with broken boxes. On that date the vessel was lying at a dock in Brooklyn. Redman testified that, while proceeding from his quarters to his work in the galley at 5 o'clock in the morning, he found the deck light out, and in the dark he stumbled over a broken box slat having a nail in it which punctured the side of his foot just above his low shoe, producing a bleeding scratch about an inch and a half long. He washed the foot with hot water and continued at work without discomfort. The next day, however, his foot was swollen and pained him. He says he told the chief steward of it, which the latter denies. In the evening he went ashore, got some liniment at a drug store, and spent the night ashore. The following day, February 15th, his ship was to sail shortly after noon. He got to the dock after she had gone. He returned to a rooming house and nursed his foot with applications of liniment and hot water until the morning of the 21st, when his condition was so serious that an ambulance was called which took him to the hospital, where an operation of periarterial sympathectomy was performed on February 24th, followed several weeks later by the amputation. The theory of the case is that the scratch became infected and the infection produced gangrene because of the diseased condition of the plaintiff's arteries.

Redman's story that he punctured his foot with a nail while walking along the deck in the dark is wholly unsup-

ported; no witness testified to seeing the wound or to hearing Redman complain of it. No witness could contradict [fol. 345] the story because he was alone when he says it happened. But Redman's own conduct contradicts it most completely. Dr. Perez, who took down his history when he was admitted to the hospital, says that he made no mention of a cut or scratch, but told of a sudden onset of pain a few days before and of applications of water so hot as to produce blisters. Dr. Wikle, who performed the first operation, talked with the plaintiff about his case, and to him not a word was said of any scratch. Nor did Redman speak of it to two other doctors who saw him at the hospital, Dr. Charache and Dr. Shatara, though they could not say that they had ever asked him specifically about the history of his case. It is incredible that Redman would not have mentioned the nail scratch to the hospital doctors, if his story were true. Had the scratch given him no trouble, he might not think of its connection with what followed, and so might remain silent about it. But his story is that it bothered him almost at once and grew continuously worse. He says his scratched foot began to pain him on the 14th so much that he went ashore to get some sort of dressing for it; that it was so painful he decided to stay on shore and was kept awake with the pain most of the night, and so overslept and lost his ship; that his foot continually got worse right up to February 21st. Under such circumstances no man could have failed to think of the connection between the injury and the condition he was in when his history was taken at the hospital. He says by way of explanation that he was out of his head when admitted, which nobody confirms. After prodding by questions, he testified he did mention the scratch to Dr. Perez, which the latter denies.

On the afternoon of February 14, the day following the alleged accident, Redman signed articles for the next voyage and was passed as fit by the medical examiner for the defendant company. Although he had noticed that his foot was swollen and somewhat painful, he said nothing about it to the medical examiner, and his attempted explanation of his silence is not convincing. In March, 1931, he called at the office of the defendant's claim agent and signed and swore to two written statements, which the agent dictated to a stenographer as Redman told his story. These statements give a very different account from that to which

Redman now testifies, and make no mention whatever of any injury by a nail. He denies, contradicting the agent's testimony, that he read the statements before signing them, and we must accept it that he did not. But the statements do not read like fabrications. They make complaint that he got his feet wet working in the rain, that his quarters were very cold because the steam had been ordered shut off, and on February 12th his left foot began to pain him. It is highly unlikely that the adjuster should have substituted this ground of complaint for that of the nail scratch, which Redman says was the one he then made. While not conclusive against him, these statements, added to the testimony of the impartial hospital doctors, strongly corroborate their theory that Redman's gangrene resulted not from a wound, but from syphilitic endo-arteritis, being precipitated perhaps by exposure to cold or to extreme heat (applications of hot water). On the whole record the inference is irresistible that the story of the nail did not come into the plaintiff's mind until he prepared to bring the present suit. Moreover, the hospital doctors are all in agreement that the type of "dry" gangrene with which the plaintiff was afflicted could not have resulted from an infected wound unless the wound had caused a stoppage in the arteries by reason of infection, and the medical testimony that there was no infection is undisputed. Had the plaintiff suffered from "wet" gangrene, the operation of periarterial sympathectomy would never have been performed, and the amputation of his foot could not have been postponed, as it was, until April 17th. It was proved beyond doubt that no infected wound was discovered upon the plaintiff's foot when he came to the hospital; yet all say it would have been seen had there been a scratch which had become infected. Dr. Neustaedter, who first saw the plaintiff shortly before the trial, gave his opinion, in response to a hypothetical question, that an injury by a nail puncture such as the plaintiff had described was a competent producing cause of the gangrene which existed; but the question failed to take into account that the gangrene was of the dry type, and his opinion is not entitled to override the testimony of the doctors who actually treated the plaintiff. Obviously the verdict for $5,000 was the result of a very natural sympathy for a man who had suffered so serious a disability.

We have examined the entire record with care and are convinced that the evidence is insufficient to support the verdict. The uncorroborated story of the plaintiff is so thoroughly contradicted by his own conduct as well as by the unimpeached testimony of disinterested witnesses that [fol. 346] no impartial jury could have found a verdict in his favor. His testimony that a nail produced a bleeding scratch an inch and a half long is disproved by the physical fact that no such scratch was visible when he reached the hospital. When the only testimony for a plaintiff is contrary to physical facts proven without contradiction, a verdict for the plaintiff should be set aside. See Union Indemnity Co. v. Leidesdorf, 37 F. (2d) 26 (C. C. A. 2); Baltimore & O. R. Co. v. O'Neill, 186 F. 13, 15 (C. C. A. 6); Falkenstern v. Greenfield, 145 Wis. 232, 130 N. W. 61. Indeed the court charged the jury that "the testimony of the medical witnesses is undisputed that there was no evidence of a wound on Redman's foot and if you believe the testimony of plaintiff's witness Dr. Wikle and defendant's witnesses that a wound 1½ inches long received on February 13, 1930, producing an infection sufficient to cause gangrene would be visible on examinations made in the Cumberland Hospital on February 22, 1930, and thereafter, then you must find for the defendant."

We think that the jury were constrained to believe such testimony for there was no substantial evidence that an infected scratch would not have been visible. Dr. Neustaedter's opinion that the blisters might have concealed it was mere speculation. The doctors who actually saw Redman were sure there was no such scratch. It has repeatedly been held by the highest authority that before evidence may be left to the jury there is a preliminary question for the trial judge, which is not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed. See Pleasants v. Faut, 22 Wall. 116, 120, 22 L. Ed. 780; Penn. R. R. Co. v. Chamberlain, 288 U. S. 333, 343, 53 S. Ct. 391, 77 L. Ed. 819. Within this principle we think the defendant's motion for a directed verdict should have been granted. Accordingly the judgment must be reversed, and the cause remanded for a new trial. We have no power to direct a dismissal without prejudice, as the appellant urges. Slo-

cum v. N. Y. Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029.

Judgment reversed.

Manton, Circuit Judge, dissents with opinion.

[fol. 347] In United States Circuit Court of Appeals for the Second Circuit, October Term, 1933

No. 268

Argued January 31, 1934. Decided April 30, 1934

Donald Redman, Plaintiff-Appellee,

v.

Baltimore & Carolina Line, Inc., Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, L. Hand, and Swan, Circuit Judges

Dissenting Opinion

Manton, Circuit Judge (dissenting):

Because the decision about to be rendered by the majority destroys a jury's determination, which should prevail here, I dissent.

The credibility of witnesses, the weight and probative value of all the evidence, are to be determined by the jury and not by the judge. Southwestern Brewery v. Schmidt, 226 U. S. 169, 33 S. Ct. 68, 57 L. Ed. 170; Baltimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521, 524, 45 S. Ct. 169, 69 L. Ed. 419. It is not within the province of the court to pass upon the credibility of the witnesses; that is the jury's function. A judge may determine whether upon all the evidence a jury could reasonably have found for the plaintiff, and, if the jury could not, the verdict may be set aside. But we may not set aside a verdict simply because we disagree with the finding.

The appellee is uncontradicted in so far as he relates how he scratched his foot on a nail projecting from a slat

from a broken box when going to his duties on a dark night.

The steward denied having been told about the scratch but his unreliability was clearly shown by his connection with what appeared to have been an offer to sell his testimony to the highest bidder. Appellee's explanation of his failure to consult with a physician, who was on board primarily to discover venereal disease, is not conclusive but goes merely to his credibility. And it was for the jury to weigh the testimony of the claim adjuster keeping in mind his interest and contradictory statements.

Dr. Perez' denial of having been told about the scratch and the apparent resentment shown by him at the slightest intimation of lack of professional ability, his resulting hostility, the fact that he did not make out his report or history of the appellee's case the day he made the examination, together with his ability or inability to understand English, were all circumstances to be weighed by the jury; particularly the probability of misunderstanding the appellee. Nor was it an outstanding or determining circumstance that the appellee failed to inform the other doctors of the scratch in view of what a layman of his mentality might have thought if a doctor had been told of a scratch and appeared to consider it unimportant.

The medical testimony that an external injury would not be a competent producing cause of dry gangrene was in conflict. Although the doctors testified that there was no infection, it must be observed that they had not seen the foot until after gangrene had set in and what observations they did make were probably influenced by preconceived ideas gathered from Dr. Perez' prior report. In any case, the weight of this expert testimony was for the jury, McGowan v. American Tan Bark Co., 121 U. S. 575, 7 S. Ct. 1315, 30 L. Ed. 1027. In my opinion we cannot say that the jury were unreasonable in giving credit to Redman's [fol. 348] testimony that there was infection and to the testimony of others that an infected scratch could have brought on the gangrene.

In Union Indemnity Co. v. Leidesdorf, 37 F. (2d) 26, we held that the evidence did not warrant the case going to the jury where the facts could not possibly support the plaintiff's theory. To be sure, in every case before the question of fact is left to the jury, there is for consideration of the trial judge the preliminary question of whether

there is literally no evidence or whether there is any evidence upon which the jury could properly proceed to find a verdict. That is not the instant case.

In Pennsylvania R. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819, the court held that the trial judge may not submit to the jury issues of fact where uncontradicted and unimpeached witnesses show affirmatively that the facts sought to be inferred did not exist. But here we have a question of credibility only, which is peculiarly for a jury. No inference has to be drawn that there was an infection, for there is positive testimony to that effect. The appellee testified that he noticed his foot swollen and discolored where the nail went in, and where it was cut there was a red and swollen spot and "later it went to his toes." In this situation, the trial judge could have done nothing other than submit the question to the jury. Ætna Life Ins. Co. v. Ward, 140 U. S. 76, 11 S. Ct. 720, 35 L. Ed. 371.

Nor does this case come within the rule announced in Penna. R. R. Co. v. Chamberlain, supra, that, where proven facts give equal support to each of two inconsistent inferences, in which event, neither of them being established, judgment as a matter of law must go against the party on whom rests the necessity of sustaining one of these inferences as against the other before he is entitled to recover. The fact here is that the appellee's case rests upon sufficient support in the testimony that he had an infection resulting from a competent producing cause, which in turn resulted in gangrene setting in and the ultimate amputation of his leg. The judgment should be affirmed.

[fol. 349] In United States Circuit Court of Appeals, Second Circuit

Donald Redman, Plaintiff-Appellee,

vs.

Baltimore & Carolina Line, Inc., Defendant-Appellant

Judgment—Filed May 7, 1934

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the

Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed with costs and cause remanded for a new trial. Further ordered that execution issue for collection of said costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 350] [File endorsement omitted.]

[fol. 351] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 352] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,806. U. S. Circuit Court of Appeals, Second Circuit. Term No. 178. Baltimore & Carolina Line, Inc., Petitioner, vs. Donald Redman. Filed July 14, 1934. File No. 178, O. T., 1934.

TABLE OF CONTENTS.

	PAGE
Petition	1
Case History	1
Question Presented	2
Brief	7
FIRST POINT—The Circuit Court of Appeals misinterpreted and misapplied the decision of this Court in the *Slocum* case and gave to it a construction inconsistent with its own recent decisions	7
SECOND POINT—The decision of the Circuit Court of Appeals is contrary to the strictly limited interpretation placed upon the *Slocum* case by subsequent decisions of this Court and Lower Federal Courts	13
LAST POINT—The prayer of the petitioner should be granted	19

TABLE OF CASES:

Bohenik v. *Delaware & Hudson Co.*, 49 F. (2d) 722... 4

Capital Traction Co. v. *Hof*, 174 U. S. 1, 13..... 16
Clemence v. *Hudson & M. Ry. Co.*, 11 F. (2d) 913.... 3, 9

Gasoline Products Co., Inc. v. *Champlin Refining Co.*, 283 U. S. 494 (1931).....15, 17
Glynn v. *Krippner*, 47 F. (2d) 281..... 14
Glynn v. *Krippner*, 60 F. (2d) 406..... 14

Hoffman v. *American Mills Co.*, 288 Fed. 708.....3, 12

Isaacson v. *United States*, 3 Fed. Supp. 350..... 15
Italian Star Line, Inc. v. *United States Shipping Board Emergency Fleet Corporation*, 41 F. (2d) 382..... 11
Italian Star Line, Inc. v. *United States Shipping Board Emergency Fleet Corporation*, 53 F. (2d) 359....4, 10

PAGE

Parsons v. *Bedford*, 3 Pet. 433..... 16

Pedersen v. *Delaware, Lackawanna & Western R. R.*, 229 U. S. 146 (1913)..... 11

Redman v. *Baltimore & Carolina Line, Inc.*, 70 F. (2d) 635..... 1, 4

Royal Card & Paper Co. v. *Dresdner Bank*, 27 F. (2d) 791..... 4, 10

Slocum v. *New York Life Ins. Co.*, 228 U. S. 364 (1913)..... 2, 3, 7, 8, 9, 10, 13, 14, 15, 16, 18

Supreme Court of the United States

OCTOBER TERM, 1934—No.

BALTIMORE & CAROLINA LINE, INC.,
(Defendant-Appellant below),
Petitioner,

—against—

DONALD REDMAN,
(Plaintiff-Respondent below),
Respondent.

Petition for Writ of Certiorari to Circuit Court of Appeals for the Second Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Baltimore & Carolina Line, Inc., respectfully shows to this Honorable Court as follows:

1. *The Proceedings and Decisions of the Lower Courts.*

This is a petition for *certiorari* brought to obtain review of that part of the decision of the Circuit Court of Appeals for the Second Circuit, filed April 30, 1934, refusing a dismissal of the complaint without prejudice and remanding the cause for a new trial, after reversing a judgment entered on a jury verdict in favor of the respondent, in the District Court for the Southern District of New York on the 7th day of April, 1933. *Redman* v. *Baltimore & Carolina Line, Inc.*, 70 F. (2d) 635.

The action was instituted to recover damages for personal injuries allegedly caused by the petitioner's negligence.

Upon the trial, at the close of respondent's case and again, at the end of the entire case, motions were made by petitioner to dismiss the complaint for lack of proof (R., pp. 174-178, 295).

At the close of the entire case, petitioner moved for the direction of a verdict (R., p. 295).

The Trial Court reserved decision upon these motions until the jury had returned its verdict, when each motion was specifically denied (R., p. 320).

Petitioner's motion to set aside the verdict was likewise denied (R., p. 320).

Appropriate exceptions were duly taken in each instance (R., p. 320).

Upon appeal it was contended by petitioner that the denial by the Trial Court of these motions constituted reversible error. It was urged further that if the Circuit Court of Appeals should find that the complaint should have been dismissed for lack of proof at the close of plaintiff's case, the judgment should be reversed and the District Court directed to enter judgment dismissing the complaint without prejudice, that is: for lack of proof.

The Circuit Court of Appeals after reviewing the evidence, reversed the judgment below and remanded the case for a new trial. In doing so, it said (p. 638):

> "We have no power to direct a dismissal without prejudice, as the appellant urges. *Slocum* v. *N. Y. Life Ins. Co.*, 228 U. S. 364."

2. *The Question Sought to Be Here Reviewed and the Reasons Why the Writ Should Be Granted.*

The question presented on the present application is as follows:

Under the Seventh Amendment to the Constitu-

tion of the United States, may a Federal Appellate Court, in reversing a judgment entered upon a jury verdict in a Federal District Court, direct the lower court to enter judgment dismissing the complaint without prejudice, where the proofs failed to establish a cause of action and the trial court reserved decision of motions to dismiss the complaint (made at the close of the plaintiff's case and at the close of the entire case) until after a verdict for the plaintiff, and then erroneously denied said motions?

The Circuit Court of Appeals for the Second Circuit has answered this question in the negative, upon the authority of a decision by a bare majority of this Court in *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, decided April 21, 1913. In doing so, the Court misinterpreted and misapplied the precedent referred to, which, as is pointed out in the brief annexed, has no application to the situation presented by the case at bar.

The holding of the *Slocum* case has been bitterly assailed and harshly criticized. Ever since its decision, lower courts, trial and appellate, have vigilantly seized upon the slightest distinction to escape its limitations upon their powers. Yet the Circuit Court of Appeals for the Second Circuit has unnecessarily widened the scope of that case, giving to it an effect unwarranted by the opinion rendered therein.

Even assuming the *Slocum* case to be applicable, the time has come when this Court may well overrule its decision in that case, so that substantial right may have precedence over technical formalism.

The Circuit Court of Appeals decided the question here presented in a way inconsistent with its own decisions: *Hoffman* v. *American Mills Co.*, 288 Fed. 768, decided March 13, 1923, certiorari denied, 263 U. S. 701; *Clemence* v. *Hud-*

son & M. Ry. Co., 11 F. (2d) 913, decided April 19, 1926; *Royal Card & Paper Co.* v. *Dresdner Bank*, 27 F. (2d) 791, decided August 20, 1928; *Bohenik* v. *Delaware & Hudson Co.*, 49 F. (2d) 722, decided May 11, 1931, certiorari denied, 284 U. S. 643; *Italian Star Line, Inc.* v. *United States Shipping Board Emergency Fleet Corporation*, 53 F. (2d) 359, decided August , 1931. As a result, in the Second Circuit, the law controlling the issue involved is in a confused and unsettled state, and should be clarified by this Court.

The precise question here presented has never been but should be, settled by this Court.

The issue concerns not only the construction of the Seventh Amendment to the Constitution of the United States preserving the right to trial by jury, but also the correct interpretation and application of a decision of this Court, defining the limitations of that Amendment. Involving as it does, the reviewing powers of Federal Appellate Courts throughout the land in all civil jury cases, the question raised is of nationwide interest and importance to judges, practitioners and litigants. Clearly, a decision contrary to that rendered by the Circuit Court of Appeals would substantially diminish repetitious litigation—a result to be achieved, if constitutionally possible.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding the said court to certify and send to this court, on a day to be designated, for its review and determination, a full and complete transcript of the record of all proceedings in the said Circuit Court of Appeals had in said cause entitled in that court, "*Donald Redmon, Plaintiff-Respondent, against Baltimore & Carolina Line, Inc., Defendant-Appellant, October*

Term, 1933, No. 268;" that the final order of the Circuit Court of Appeals made and entered in said cause on the 16th day of May, 1934, in so far as the same remands said cause to the District Court for the Southern District of New York for a new trial, may be reversed by this Honorable Court; that this Honorable Court may, by appropriate decree, direct a dismissal of the complaint in said cause, without prejudice; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

GEORGE WHITEFIELD BETTS, JR.,
Counsel for Petitioner.

State of New York,
County of New York—ss.:

GEORGE WHITEFIELD BETTS, JR., being duly sworn, deposes and says that he is one of the counsel for the above named petitioner; that he has read said petition and that said petition is true to the best of his knowledge, information and belief.

GEORGE WHITEFIELD BETTS, JR.

Sworn to before me this
10th day of July, 1934.

ISABEL W. BONNER,
Notary Public,
N. Y. Co.
No. 220, Reg. Office No. 6379.
Comm. Expires March 30, 1936.

Supreme Court of the United States

OCTOBER TERM, 1934—No.

BALTIMORE & CAROLINA LINE, INC.,
(Defendant-Appellant below),
Petitioner,

—against—

DONALD REDMAN,
(Plaintiff-Respondent below),
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The case history is summarized in the petition.

FIRST POINT.

The Circuit Court of Appeals misinterpreted and misapplied the decision of this Court in *The Slocum* case, and gave to it a construction inconsistent with its own recent decisions.

The case of *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, was a suit at law brought in the Circuit Court for the Western District of Pennsylvania to recover the proceeds of a life insurance policy. At the conclusion of all the evidence, the defendant moved for a directed verdict. The motion was denied, and the case was submitted to the jury, which rendered a verdict for the plaintiff.

Thereupon, pursuant to Pennsylvania state practice, the defendant made a motion for judgment *non obstante veredicto*, which was denied. Upon appeal, the judgment entered on the verdict was reversed, and the court below was directed to enter judgment for the defendant notwithstanding the verdict.

The plaintiff appealed to this Court, which decided that, while the Circuit Court of Appeals had not erred in reversing the judgment, it was powerless under the Seventh Amendment to direct judgment for the defendant on the evidence and was limited to remanding the cause for a new trial.

Substantial distinctions exist between the *Slocum* case and the case at bar. There, the Seventh Amendment was violated because the appellate court "assumed to pass *finally upon the issues of fact presented by the pleadings* and to direct judgment accordingly". Here, the Circuit Court of Appeals was not asked to decide *finally any issue of fact*, but was called upon to declare that *no triable issue of fact was presented by the evidence* and to dismiss the complaint *without prejudice*. There is a patent difference between substituting the decision of an appellate court for the determination by a jury of a disputable question of fact, and holding that the facts adduced on the trial as matter of law presented no triable issue for the jury to determine.

The *Slocum* case recognizes this very distinction (p. 394):

> "In what has been said we would not be understood as implying that a motion for a compulsory non-suit and a demurrer to the evidence are equivalents of a request for a directed verdict, for while they are sometimes spoken of as analogous to it, this only means that for the purpose of each the evidence must be taken most strongly in favor of the opposite party. In other respects they are essentially unlike. *A motion for a compulsory non-suit*

> *looks to an arrest of the trial and a dismissal of the cause, leaving the merits undetermined and the plaintiff free to sue again,* while a request for a directed verdict looks to a completion of the trial and an adjudication of the merits through the accustomed cooperation of the court and jury." (Italics ours.)

The distinction was likewise recognized by the Circuit Court of Appeals for the Second Circuit in *Clemence* v. *Hudson & M. Ry. Co.* (11 F. (2d) 913). Suit was there brought under the Employers' Liability Act to recover damages for personal injuries. Before verdict, the defendant moved for a non-suit, the motion was denied, and a verdict rendered for plaintiff. Thereafter, the trial court set aside the verdict, directed a verdict for the defendant, and entered judgment on it, dismissing the complaint on the merits.

In reviewing this action by the trial court, the Court of Appeals, through Hand, *J.*, commented (p. 915):

> "The trial judge set aside the verdict, and then directed a verdict of his own, upon which he entered judgment. These last two acts he had no power to do. *Slocum* v. *N. Y. Life Ins. Co.* * * * His only lawful conclusion upon setting aside the verdict was to set the cause down for a new trial. * * * Had he let the verdict stand and directed judgment in spite of it, we might perhaps have reversed the judgment and entered the original judgment upon the verdict, which in that case would have stood throughout. *Hoffman* v. *American Mills Co.* (C. C. A.) 228 F. 768. *Had his judgment of nonsuit been right, we might perhaps have affirmed it, though he had set aside the verdict.*" (Italics ours.)

The *Slocum* case is further distinguishable from the instant case in that here the trial court, without objection, reserved decision of petitioner's motions to dismiss until

after the verdict had been rendered, while in the *Slocum* case defendant's motion for a directed verdict was denied *before* the issue went to the jury.

The District Court had constitutional power to *grant* the petitioner's motions despite the verdict, if the decision of the Circuit Court of Appeals for the Second Circuit in *Royal Card & Paper Co.* v. *Dresdner Bank* (27 F. (2d) 791) is a correct exposition of the law. In that case, a motion for a non-suit was made by defendant and the trial judge reserved decision until after a verdict for the plaintiff, when the motion was granted and the complaint dismissed upon the merits. On appeal, it was held that although a dismissal upon the merits was not permissible, there was no error in disregarding the verdict and granting a dismissal *without prejudice*. The judgment below was accordingly modified.

Identical procedure was upheld as constitutional in *Italian Star Line, Inc.* v. *United States Shipping Board Emergency Fleet Corporation* (53 F. (2d) 359). This was a tort action. At the trial a motion to dismiss the complaint had been made at the close of the plaintiff's case and again at the end of the entire case, and decision thereof had been reserved until after a verdict in plaintiff's favor. The trial court then set the verdict aside and dismissed the complaint for failure of proof. It was expressly urged by the plaintiff "that under the doctrine of *Slocum* v. *New York Life Insurance Co.* * * * the trial court had no power to dismiss the complaint after the jury had returned a verdict for the plaintiff; that the most which could be done was to set aside the verdict and declare a new trial".

In the Circuit Court of Appeals for the Second Circuit, after holding that the procedure followed by the District Court would be authorized in the Courts of New York State, and that the State practice had been properly

adopted, Judge Swan, writing for a unanimous bench, stated (p. 360):

> "The propriety of setting aside the verdict and passing upon the motion under such circumstances has been recognized by this Court in *Royal Card & Paper Co.* v. *Dresdner Bank*, 27 F. (2d) 791. *The Slocum case has no application to such a situation. There is no violation of the right to trial by jury in dismissing a complaint for failure to establish a cause of action.* (*Bohenik* v. *Delaware & Hudson Co.*, 49 F. (2) 722.)" (Italics ours.)

The comment of trial judge Coxe in passing upon the motions to dismiss after verdict, is pertinent. Said he (41 F. (2d) 382, at 384):

> "I find nothing in *Slocum v. N. Y. Life Insurance Co.* * * * to conflict with the practice followed in this case. It is not at all unusual, in this District, to reserve decision, on the consent of the parties, on motions to dismiss until after the verdict of the jury. And I can see no illegality or impropriety in such procedure. *The motion raises only a question of law and the decision thereon is in no way a usurpation of the functions of the jury.*" (Italics ours.)

In the case at bar, the Circuit Court of Appeals was asked simply to direct the District Court to do what, according to these precedents, it had the undoubted power to do and should have done. The Seventh Amendment is equally restrictive upon all courts, trial and appellate. (*Pedersen* v. *Delaware, Lackawanna & Western RR.*, 229 U. S. 146.) If the lower court could have dismissed despite the verdict, surely it is only logic to conclude that the Circuit Court of Appeals may direct a dismissal erroneously denied. In doing so, it would be called upon to review, not the verdict of a jury, but only the action of the trial

court in denying the motions to dismiss. The error corrected is the error of the court, not the jury. The province of the jury is not invaded. Such procedure in no wise contravenes the Seventh Amendment.

This view was entertained, at least inferentially, by the Circuit Court of Appeals for the Second Circuit in *Hoffman* v. *American Mills Co.* (288 Fed. 768, certiorari denied, 263 U. S. 701). Upon the trial of that case, the Court submitted the issues to the jury, reserving decision of a motion to dismiss the complaint. After verdict in the plaintiff's favor, the complaint was dismissed, but the verdict itself permitted to stand. The trial judge stated that if he were wrong, the appellate court might direct judgment on the verdict and thus avoid a new trial.

The Circuit Court of Appeals reviewed the dismissal of the complaint, and finding it erroneous, directed judgment upon the verdict. It said (p. 773):

> "We think it would not be a breach of the Seventh Amendment of the Federal Constitution to order the verdict reinstated. In *Slocum* v. *New York Life Ins. Co.*, * * * the verdict was set aside and judgment directed, dismissing the complaint. This was held to be in violation of the Seventh Amendment. But in the case at bar, the Court expressly refused to set aside the verdict. The right of jury trial was therefore accorded the defendant *and our determination here in no wise re-examines the facts tried by the jury.*" (Italics ours.)

If the Circuit Court of Appeals had *upheld* the dismissal below as *proper*, would it, in any greater sense have "re-examined the facts tried by the jury?" Or, if the dismissal below had been erroneously denied and the Circuit Court of Appeals had corrected the error by directing such dismissal, would its determination have involved a re-examina-

tion of "the facts tried by the jury?" These questions answer themselves. In the case cited the appellate court asserted and exercised its power to review the disposition by the trial court of a motion to dismiss the complaint decided after verdict for the plaintiff and to direct judgment accordingly. Yet it refused to do this very thing in the case at bar.

Concededly, in actions at law tried before a jury, if it appears upon appeal that, although the judgment appealed from was erroneous, there remains an issue of fact to be determined before the proper judgment can be rendered, a new trial must be ordered so that the disputed question may be decided by the jury. So much is required by the Seventh Amendment. But, it is submitted, that in cases wherein, as here, the trial court should have disposed of the case without submitting it to the jury at all, either by dismissing the complaint or by directing a verdict, the appellate court should be empowered to direct the entry of the judgment which the trial judge should have ordered, without the useless formality, delay and expense involved in remanding the case for a new trial of a non-existing issue.

SECOND POINT.

The decision of the Circuit Court of Appeals is contrary to the strictly limited interpretation placed upon the *Slocum* case by subsequent decisions of this and lower federal courts.

The *Slocum* case was decided over twenty years ago. Four justices dissented. The vigorous minority opinion was rendered by the present Chief Justice. Of the other members of that court, but one remains. We feel justified in saying that lesser Federal Courts are looking to this tribunal, as presently constituted, for a salutary limitation

of, if not a departure from the technical common law formalism read into the constitution by the *Slocum* case. This very hope was expressed by the District Court of the United States for the District of Minnesota, in *Glynn* v. *Krippner*, 47 F. (2d) 281, at 283:

> "It seems to me very probable that the Supreme Court of the United States as now constituted is unlikely to hold again that the constitution prohibits the granting of judgment notwithstanding the verdict. * * *
>
> I hope that the Court of Appeals may see fit to certify the question of the right of a federal court to grant such judgment where the laws of the state permit that practice, to the Supreme Court of the United States for reconsideration."

In the same case, the Circuit Court of Appeals for the Eighth Circuit (60 F. (2d) 406, 407), admitted that "the dissenting opinion in the *Slocum* case seems to us, as it seemed to the trial judge, convincing", but held that the particular question involved, having once been decided by the Supreme Court, could not be certified for reconsideration; at the same time it pointed out (p. 410):

> "If, for any cause, the Supreme Court may wish to reconsider the question—an application to that tribunal to cause the record in the present case to be certified up to it may afford the appellant the remedy he seeks. For this court there is nothing to do but to affirm the judgment on the authority of the case cited * * *"

Unfortunately, there is no record of such a petition for certiorari having been filed.

As recently as May 8, 1933, the *Slocum* case was severely criticized and rigidly limited to its precise facts by the District Court for the Southern District of New York in

Isaacson v. *United States*, 3 Fed. Supp. 350. There, the trial court denied defendant's motion for a directed verdict and submitted the issues to the jury, which subsequently reported its inability to agree. Thereupon it was directed to return a verdict for the defendant. Plaintiff then asked that the verdict be set aside and a new trial ordered, on the ground that the action of the court violated his rights under the Seventh Amendment.

In denying the motion, Judge Knox distinguished the *Slocum* case and continued (p. 351):

> "In addition, it should be noted that three justices of the Supreme Court concurred with the present Chief Justice, in dissenting from the decision in the *Slocum* case, and that the majority view has been subjected to vigorous attack by various text-writers. See Schofield, New Trials and the Seventh Amendment, 8 Ill. L. Rev. 287, 381, 465; Thorndike, Jury Trials in the United States Courts, 26 Harv. L. Rev. 732; Committee of the American Bar Association, Proceedings, 1913, XXXVIII, 561.
>
> *These factors are conducive to a narrow interpretation of the Slocum case, rather than to an extension of its doctrine to cover such a situation as is presented by the case at bar* * * * *Common sense dictates that the labor and expense of a new trial should not have to be undergone merely because an erroneous ruling was made, where the court, upon further consideration, can correct such ruling.* In my opinion, the Seventh Amendment, as applied in *Slocum* v. *New York Life Insurance Co.*, *supra*, does not deprive the court of this power." (Italics ours.)

The constructions given the Seventh Amendment by this court in the *Slocum* case, decided in 1913, and in *Gasoline Products Co., Inc.* v. *Champlin Refining Co.* (283 U. S. 494), decided in 1931, form a startling contrast. In the

Slocum case this court held that the Seventh Amendment not only preserved the substance of the right to trial by jury, but as well the common law procedural rules governing the right. Discussing the clause: "and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law", it adopted the language of *Parsons* v. *Bedford*, 3 Pet. 433, decided in 1830 (p. 378):

> "This is a prohibition to the courts of the United States to re-examine any facts tried by a jury *in any other manner*. The only *modes* known to the common law to reexamine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings." (Italics ours.)

Again (p. 379), it approved unreservedly the holding of *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13, decided in 1899 to the effect:

> "that, when a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided cannot be reexamined in any court of the United States, *otherwise than according to the rules of the common law of England*; that by the rules of that law, no other *mode* of reexamination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted *in one of those two ways*, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States." (Italics ours.)

Finally, this court itself concluded (p. 379):

> "These decisions make it plain, first, that the action of the Circuit Court of Appeals in setting aside the verdict and assuming to pass upon the issues of fact and to direct a judgment accordingly must be tested *by the rules of the common law.*" (Italics ours.)

Contrast this interpretation with that contained in *Gasoline Products Co., Inc.* v. *Champlin Refining Co.* (283 U. S. 494). There the jury returned a verdict for the plaintiff. The Court of Appeals reversed because of errors in the charge of the trial court as to the measure of damages. In directing a new trial, however, it restricted the issues to the determination of damages only. It was contended that this procedure constituted a denial of the right to trial by jury, and more specifically, that, since by the rules of the common law, there could be no new trial of a part only of the issues of fact, a resubmission to the jury of the issue of damages alone, was denial of the trial by jury which the Seventh Amendment guarantees.

Mr. Justice Stone dealt with this contention, as follows (pp. 497-498):

> *"It is true that at common law there was no practice of setting aside a verdict in part.* If the verdict was erroneous with respect to any issue, a new trial was directed as to all * * *
>
> Lord Mansfield, in applying the common law rule where the verdict, correct as to one issue, was erroneous as to another, said: "* * * for form's sake, we must set aside the whole verdict * * *" *Edie* v. *East India Co.*, 1 W Bl. 295, 298. *But we are not now concerned with the form of the ancient rule. It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but*

> *with substance.* All of vital significance in trial by jury is that *issues of fact* be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law * * * *Beyond this the Seventh Amendment does not exact the retention of old forms of procedure.*" (Italics ours.)

The court referred to the *Slocum* case and used language strictly limiting that decision to the precise situation there presented (p. 499). It said that the *Slocum* case

> "decided *only* that an appellate federal court may not direct judgment *non obstante veredicto, solely* because the verdict given is not sustained by the evidence, but *in that event* must order a new trial. There it was held that the Seventh Amendment does not permit the entry of judgment on a trial at law before a jury *upon an issue of fact,* without the verdict of the jury." (Italics ours.)

It is submitted that this court has thus cast aside the narrow and technical construction given by the *Slocum* case to the Seventh Amendment which for two decades has clothed that constitutional provision with all the cumbersome trappings of an ancient code of civil procedure to the notorious impairment of substantial right, and which has compelled our Federal Courts against their rebellious common sense to apply to modern law-suits a tortuous machinery invented centuries past. We ask that this court apply an enlightened and liberal constitutional philosophy to the case at bar.

While the precise holding of the *Slocum* case may not be overruled on this appeal, that decision may at least be rigidly limited to the narrow confines of the situation there presented, which, as we have pointed out, is substantially different from that obtaining in the instant case.

LAST POINT.

The prayer of the petitioner should be granted.

Your petitioner respectfully submits that the final determination by this court of the questions of law involved is of the utmost importance to lower Federal Courts, to counsel and litigants who have recourse to them, and to the public generally.

It is believed that the decision of the Circuit Court of Appeals represents an erroneous application and an unfortunate misunderstanding of an important decision of this court, and that the result of its decision is to give to the Seventh Amendment a construction inconsistent with its own recent decisions and contrary to the rule of liberal interpretation but recently announced and applied by this Court.

Finally, it is submitted that the precise question here presented has never been decided by this court or by any other Circuit Court of Appeals of the United States.

Respectfully submitted,

GEO. WHITEFIELD BETTS, JR.,
WILLIAM R. MEAGHER,
Counsel for Petitioner.

New York City, July, 1934.

INDEX.

	PAGE
The Proceedings and Decision of the Lower Court	1
1. The District Court	1
2. The Circuit Court of Appeals	2
The Question Presented	2
FIRST POINT. The Circuit Court of Appeals misinterpreted and misapplied the decision of this Court in the *Slocum* case, and gave to it a construction inconsistent with other decisions of this Court, of Circuit Courts of Appeals in other circuits and its own recent decisions	3
SECOND POINT. The decision of the Circuit Court of Appeals is contrary to the strictly limited interpretation placed upon the *Slocum* case by subsequent decisions of this Court and lower Federal tribunals	13
THIRD POINT. The *dictum* of the *Slocum* decision that compulsory non-suits were unknown to the common law and therefore not permitted in Federal courts under the Seventh Amendment, should not be adopted as a rule of law by this Court	18
1. The *dictum* is *contra* to controlling decisions of this Court which have been followed and applied by lower Federal courts	19
2. Adoption of the *dictum* as law will introduce patent inconsistency into the rules of Federal Trial Procedure	22
3. The *dictum* has no substantial foundation in the Common Law	25
FOURTH POINT. The District Court erroneously denied petitioner's motion to dismiss the complaint for lack of proof	26
1. The conceded and undisputed facts	27

PAGE

2. Respondent's own medical testimony failed to show any causal connection between the alleged injury and the amputation 28

3. At the close of the entire case, the evidence was simply overwhelming in favor of petitioner on the issue of proximate cause 31

LAST POINT. The judgment of the Circuit Court of Appeals should be modified by eliminating therefrom the requirement of a new trial and substituting therefor a direction to enter judgment dismissing the complaint 34

TABLE OF CASES:

Bail v. *New York, New Haven & Hartford Railroad Co.*, 201 N. Y. 355 8

Board of Commissioners of City & County of Denver v. *Home Savings Bank*, 200 Fed. 28 20

Boudrot v. *Cochrane Chemical Co.*, 110 Fed. 919 19

Bright v. *Enyon*, 1 Burrow 390 25

Bulkley v. *Butler*, 2 B. & C., 434 24

Burden et al. v. *Robertson*, 7 F. (2d) 266 20

Capital Traction Co. v. *Hof*, 174 U. S. 1 (1889)..... 15

Castle v. *Bullard*, 23 Howard 172 (1859) 19

Central Transportation Co. v. *Pullman's Palace Car Co.*, 139 U. S. 24 (1891) 5, 6, 19

Chicago & Northwestern Railway Co. v. *Andrews*, 130 Fed. 65 20

Clemence v. *Hudson & M. Ry. Co.*, 11 F. (2d) 913..... 6

Colt v. *Sixth Ave. R. R. Co.*, 49 N. Y. 671 .....31, 33

Coughran v. *Bigelow*, 164 U. S. 301 (1896).....5, 6, 19, 26

Crane v. *Morris*, 6 Pet. 598 (1832) 19

Dulion v. *S. A. Lynch Enterprise Finance Corporation*, 53 F. (2d) 137 20

Ellerson v. *Grove et al.*, 44 F. (2d) 493 20

Elmore v. *Grymes*, 1 Pet. 469 (1828) 19

PAGE

Fadley v. *Baltimore & Ohio R. Co.*, 153 Fed. 514 20
Fitzgerald v. *Colt-Stewart Motor Co.*, 231 App. Div. 176 8
Francisco v. *Chicago & Alton Ry. Co.*, 149 Fed. 354 11

Gasoline Products Inc. v. *Champlin Refining Co.*, 283 U. S. 494 (1931) 15, 16, 17
Gentry v. *Singleton*, 128 Fed. 680 20
Georgia v. *Brailsford*, 3 Dallas 1 (1794) 24
Gibson v. *Hunter*, 2 H. Bl. 187 24
Glynn v. *Krippner*, 47 F. (2d) 281 13
Glynn v. *Krippner*, 60 F. (2d) 406 13
Grace v. *Fassoit*, 67 App. Div. 443 33

Hoffman v. *American Mills Co.*, 288 Fed. 768 10
Hoffman v. *American Mills Co.*, 263 U. S. 701 (1923) 10
Huntt v. *McNamee*, 141 Fed. 293 20

Isaacson v. *United States*, 3 Fed. Supp. 350 14
Italian Star Line, Inc. v. *United States Shipping Board Emergency Fleet Corporation*, 41 F. (2d) 382 8
Italian Star Line, Inc. v. *United States Shipping Board Emergency Fleet Corporation*, 53 F. (2d) 359 ..... 7, 8

Julius Klugman's Sons, Inc. v. *Oceanic Steam Navigation Co.*, 42 F. (2d) 461 20

Knight v. *Illinois Central Railroad Co.*, 180 Fed. 368 ..... 11, 20
Kraus v. *Birnbaum*, 200 N. Y. 130 ..... 31, 33

MacLachlan v. *Perry*, 68 F. (2d) 769 20
McNabb v. *Virginian Ry. Co.*, 55 F. (2d) 137 20
Migel v. *Hirsch & Co.*, 151 App. Div. 637 ..... 31, 33

Neil Bros. Grain Co. v. *Hartford Fire Ins. Co.*, 1 F. (2d) 904 20
New York Life Insurance Co. v. *Slocum*, 177 Fed. 842 4
Noble v. *C. Crane & Co.*, 169 Fed. 55 30

Oscanyon v. *Arms Co.*, 103 U. S. 261 (1880) 23
Ozagar v. *Pierce Mfg. Co.*, 134 App. Div. 800 ..... 31, 33

Parks v. *Ross*, 11 How. 362 (1850) 24
Parks v. *Southern Railway Co.*, 143 Fed. 276 ..... 20, 21

PAGE

Parsons v. *Bedford*, 3 Pet. 433 (1830) 15
Pedersen v. *Delaware, Lackawanna & Western R. R.*, 229 U. S. 146 (1913) 9
Pennsylvania Railroad Co. v. *Chamberlain*, 288 U. S. 333 (1933) 9, 22
Pleasants v. *Fant*, 22 Wall. 116 (1874) 9, 22, 24, 32
Priestly v. *Provident Savings Co.*, 112 Fed. 271 ..... 19, 20
Redman v. *Baltimore & Carolina Line, Inc.*, 70 F. (2d) 635 ..... 1, 2
Royal Card & Paper Co. v. *Dresdner Bank*, 27 F. (2d) 791 7
Russo-Chinese Bank v. *National Bank of Commerce*, 187 Fed. 80 20
Shank v. *Great Shoshone & Twin Falls Water Power Co.*, 205 Fed. 833 20
Slocum v. *New York Life Insurance Co.*, 228 U. S. 364 (1913) 2, 3, 4, 5, 6, 7, 9, 12, 13, 14, 15, 16, 17, 18, 25
Stapleton v. *Reading Co.*, 26 F. (2d) 242 20
Swift & Co. v. *Johnson*, 138 Fed. 867 ..... 9, 20
United States v. *Monson*, 1 Gall. 5 (1812) 23
Viner v. *Corporation of Reading*, 1 Y. & J. 4 24

STATUTES CITED:

Conformity Act (Revised Statutes, Section 914; 28 United States Code Annotated, Section 724) 8, 33
New York Civil Practice Act, Section 459 8
New York Civil Practice Act, Section 482 33

TREATISES CITED:

Blackstone's Commentaries, Volume 3, page 388 25
Schofield, New Trials and the Seventh Amendment, 8 Ill. Law Review, 305 26
Select Essays on Anglo-American History, Volume 1, page 367 24
Warren, History of the American Bar 24

Supreme Court of the United States

OCTOBER TERM, 1934—No. 178.

BALTIMORE & CAROLINA LINE, INC.,

Petitioner,

—against—

DONALD REDMAN,

Respondent.

BRIEF FOR THE PETITIONER.

This cause is before the Court on writ of *certiorari*, granted October 8, 1934, on the petition of Baltimore & Carolina Line, Inc., for review of that part of the decision of the Circuit Court of Appeals for the Second Circuit, reported in 70 F. (2d) 635, denying a dismissal of the complaint without prejudice and remanding the case for a new trial, after reversing a judgment entered on a jury verdict in favor of the respondent, in the District Court for the Southern District of New York, on the 7th day of April, 1933. The proceedings in the District Court are not reported.

The Proceedings and Decisions of the Lower Courts.

1. *The District Court.*

Suit was brought to recover damages for the loss of a leg suffered by respondent, a ship's cook, on the theory that he contracted gangrene necessitating amputation as a result of running his foot into a nail in a wooden slat lying on the petitioner's vessel *Frances Weems.*

The trial resulted in a jury verdict for the respondent.

Upon the trial, at the close of respondent's case and again at the end of the entire case, motions were made by

petitioner to dismiss the complaint for lack of proof (R., pp. 142-145, fols. 174-178; p. 242, fol. 295).

At the close of the entire case, petitioner also moved for the direction of a verdict (R., p. 242, fol. 295).

The District Court reserved decision of these motions until the jury had returned its verdict, when each motion was separately denied (R., p. 145, fol. 178; p. 242, fol. 295; p. 260, fols. 319-320).

Petitioner's motion to set aside the verdict was likewise denied (R., p. 260, fol. 320).

Appropriate exceptions were duly taken in each instance (R., p. 260, fol. 320).

2. *The Circuit Court of Appeals.*

Upon appeal it was contended by petitioner that the denial of these motions by the District Court constituted reversible error. It was urged further, that if the Circuit Court of Appeals should find that the complaint should have been dismissed at any stage of the proceedings below, the judgment should be reversed, and the District Court directed to enter judgment dismissing the complaint *without prejudice:* that is, for lack of proof.

The Circuit Court of Appeals, after reviewing the evidence, reversed the judgment below and remanded the case for a new trial.

In doing so, it said (p. 638):

> "We have no power to direct a dismissal without prejudice, as the appellant urges. *Slocum* v. *N. Y. Life Ins. Co.*, 228 U. S. 364."

The Question Presented.

The question presented on this appeal is as follows:

> Under the Seventh Amendment to the Constitution of the United States, may a Federal Appellate

Court, in reversing a judgment entered upon a jury verdict in a Federal District Court, direct the lower court to enter judgment dismissing the complaint without prejudice, where the proofs failed to establish a cause of action and the trial court reserved decision of motions to dismiss the complaint (made at the close of the plaintiff's case and at the close of the entire case) until after a verdict for the plaintiff, and then erroneously denied said motions?

If the question is answered affirmatively, this Court may then decide whether the District Court should have dismissed the complaint for lack of proof; and if so, modify the order of the Circuit Court of Appeals accordingly.

FIRST POINT.

The Circuit Court of Appeals misinterpreted and misapplied the decision of this Court in the *Slocum* case, and gave to it a construction inconsistent with other decisions of this Court, of Circuit Courts of Appeals in other circuits and its own recent decisions.

The Circuit Court of Appeals for the Second Circuit has answered the question presented in the negative, upon the authority of a decision by a bare majority of this court in *Slocum* v. *New York Life Insurance Company*, (228 U. S. 364), decided April 21, 1913. In doing so, the Court has misinterpreted and misapplied the precedent referred to, which has no application to the situation presented by the case at bar.

The *Slocum* case was a suit at law brought in the Circuit Court for the Western District of Pennsylvania to recover the proceeds of a life insurance policy. At the conclusion of all the evidence, the defendant moved for a

directed verdict. The motion was denied, and the case was submitted to the jury, which rendered a verdict for the plaintiff. Thereupon, pursuant to Pennsylvania state practice, the defendant made a motion for judgment *non obstante veredicto,* which was denied. Upon appeal, the judgment entered on the verdict was reversed, and the court below was directed to enter judgment for the defendant notwithstanding the verdict. (*New York Life Insurance Company* v. *Slocum,* 177 Fed. 842, 849.)

The plaintiff appealed to this Court, which decided that, while the Circuit Court of Appeals had not erred in reversing the judgment, it was powerless under the Seventh Amendment to direct judgment for the defendant on the evidence and was limited to remanding the cause for a new trial.

Substantial distinctions exist between the *Slocum* case and the case at bar. There, the Seventh Amendment was held to have been violated because the appellate court "assumed to pass *finally upon the issues of fact presented by the pleadings* and to direct a judgment accordingly" (p. 376). Here, the Circuit Court of Appeals was not asked to decide *finally any issue of fact,* but was called upon to declare that *no triable issue of fact was presented by the evidence* and to dismiss the complaint *without prejudice.* There is a patent difference between substituting the decision of an appellate court for the determination by a jury of a disputable question of fact, and holding that the facts adduced on the trial as matter of law presented no triable issue for the jury to determine.

The *Slocum* case recognizes this very distinction (pp. 394-395):

> "In what has been said we would not be understood as implying that a motion for a compulsory nonsuit and a demurrer to the evidence are equivalents of a request for a directed verdict, for while they are sometimes spoken of as analogous to it,

this only means that for the purpose of each the evidence must be taken most strongly in favor of the opposite party. In other respects they are essentially unlike. *A motion for a compulsory nonsuit looks to an arrest of the trial and a dismissal of the cause, leaving the merits undetermined and the plaintiff free to sue again,* while a request for a directed verdict looks to a completion of the trial and an adjudication of the merits through the accustomed cooperation of the court and jury." (Italics ours.)

The prevailing opinion (pp. 395-397) refers to the cases of *Central Transportation Co.* v. *Pullman's Palace Car Co.* (139 U. S. 24), and *Coughran* v. *Bigelow* (164 U. S. 301) and, concerning these precedents, remarks (pp. 396-397):

"Although they hold, one by implication and the other expressly, *that the constitutional right of trial by jury is not invaded by a statute authorizing the court to enter a compulsory nonsuit against a plaintiff for an insufficiency in his evidence, when he is not thereby prevented from suing again on the same cause of action,* they neither hold nor suggest that, consistently with that right, the court can refuse to take the verdict of the jury, or disregard it when taken, and enter a binding judgment on the evidence." (Italics ours.)

The court expressly declined to say whether these decisions "should be accepted and followed in respect of the particular matter to which they are addressed, that is, the granting of an involuntary nonsuit which leaves the merits unadjudicated" (p. 397).

Thus the *Slocum* case is not determinative of the question here presented; the opinion there expressed by the majority (pp. 392-394) that a compulsory nonsuit was unknown to the common law, and therefore not permitted in

Federal courts, is mere *obiter dicta*, without binding force, and directly *contra* to the decisions of this Court in *Central Transportation Co.* v. *Pullman's Palace Car Co.* (139 U. S. 24) and *Coughran* v. *Bigelow* (164 U. S. 301); and the Circuit Court of Appeals was unwarranted in applying the decision as a conclusive precedent to the instant case.

The distinction between a nonsuit and a directed verdict was likewise recognized by the Circuit Court of Appeals for the Second Circuit in *Clemence* v. *Hudson & M. Ry. Co.* (11 F. (2d) 913). Suit was there brought under the Employers' Liability Act to recover damages for personal injuries. Before verdict, the defendant moved for a nonsuit, the motion was denied, and a verdict rendered for plaintiff. Thereafter, the trial court set aside the verdict, directed a verdict for the defendant, and entered judgment on it, dismissing the complaint *on the merits*.

In reviewing this action by the trial court, the Circuit Court of Appeals, through Hand, *J.*, commented (p. 915):

> "The trial judge set aside the verdict, and then directed a verdict of his own, upon which he entered judgment. These last two acts he had no power to do. *Slocum* v. *N. Y. Life Ins. Co.* * * * His only lawful conclusion upon setting aside the verdict was to set the cause down for a new trial. * * * Had he let the verdict stand and directed judgment in spite of it, we might perhaps have reversed the judgment and entered the original judgment upon the verdict, which in that case would have stood throughout. *Hoffman* v. *American Mills Co.* (C. C. A.), 228 F. 768. *Had his judgment of nonsuit been right, we might perhaps have affirmed it, though he had set aside the verdict.*" (Italics ours.)

The *Slocum* case is further distinguishable from the instant case in that here the trial court, without objec-

tion, *reserved decision* of petitioner's motions to dismiss until *after* the verdict had been rendered, while in the *Slocum* case defendant's motion for a directed verdict was *denied before* the issue went to the jury.

The District Court had constitutional power to *grant* the petitioner's motion despite the verdict, if the decision of the Circuit Court of Appeals for the Second Circuit in *Royal Card & Paper Co.* v. *Dresdner Bank* (27 F. (2d) 791) is a correct exposition of the law. In that case, a motion for a non-suit was made by defendant and the trial judge reserved decision until after a verdict for the plaintiff, when the motion was granted and the complaint dismissed upon the merits. On appeal, it was held that although a dismissal upon the merits was not permissible, there was no error in disregarding the verdict and granting a dismissal *without prejudice*. The judgment below was accordingly modified.

Identical procedure was upheld as constitutional in *Italian Star Line, Inc.* v. *United States Shipping Board Emergency Fleet Corporation* (53 F. (2d) 359). This was a tort action. At the trial a motion to dismiss the complaint had been made at the close of the plaintiff's case and again at the end of the entire case, and decision thereof had been reserved until after a verdict in plaintiff's favor. The trial court then set the verdict aside and dismissed the complaint for failure of proof. It was expressly urged by the plaintiff "that under the doctrine of *Slocum* v. *New York Life Insurance Co.* * * * the trial court had no power to dismiss the complaint after the jury had returned a verdict for the plaintiff; that the most which could be done was to set aside the verdict and declare a new trial" (pp. 359-360).

In the Circuit Court of Appeals for the Second Circuit, it was held that the procedure followed by the District

Court would be authorized in the Courts of New York State (New York Civil Practice Act, Sec. 459; *Bail* v. *New York, New Haven and Hartford Railroad Co.*, 201 N. Y. 355, 94 N. E. 863; *Fitzgerald* v. *Colt-Stewart Motor Co.*, 231 App. Div. 176); and that the State practice had been properly adopted under the Conformity Act (Revised Statutes, Sec. 914 [28 United States Code Annotated, Sec. 724]). Judge Swan, writing for a unanimous bench, then stated (p. 360):

> "The propriety of setting aside the verdict and passing upon the motion under such circumstances has been recognized by this Court in *Royal Card & Paper Co.* v. *Dresdner Bank*, 27 F. (2d) 791. *The Slocum Case has no application to such a situation. There is no violation of the right to trial by jury in dismissing a complaint for failure to establish a cause of action.* (*Bohenik* v. *Delaware & Hudson Co.*, 49 F. (2d) 722.)" (Italics ours.)

The comment of Trial Judge Coxe in passing upon the motions to dismiss after verdict, is pertinent. Said he (41 F. (2d) 382, at 384):

> "I find nothing in *Slocum* v. *N. Y. Life Insurance Co.* * * * to conflict with the practice followed in this case. It is not at all unusual in this district to reserve decision, on consent of the parties, on motions to dismiss until after the verdict of the jury. And I can see no illegality or impropriety in such procedure. *The motion raises only a question of law, and the decision thereon is in no way a usurpation of the functions of the jury.*" (Italics ours.)

In the case at bar, the Circuit Court of Appeals was asked simply to direct the District Court to do what, according to these precedents, it had the undoubted power

to do and should have done. The Seventh Amendment is equally restrictive upon all courts, trial and appellate. (*Pedersen* v. *Delaware, Lackawanna & Western R. R.*, 229 U. S. 146, 153.) If the lower court could have dismissed despite the verdict, surely it is only logic to conclude that the Circuit Court of Appeals may direct a dismissal erroneously denied. In doing so, it would be called upon to review, not facts tried by a jury, but only a preliminary question of law necessarily decided by the trial judge in denying the motions to dismiss (*Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U. S. 333, 343; *Pleasants* v. *Fant*, 22 Wall. 116, 120-121).

Mr. Justice Van Devanter, who wrote the prevailing opinion in the *Slocum* case, said, in *Swift & Co.* v. *Johnson* (138 Fed. 867, 874-875):

> "In the federal courts, when the evidence upon a question of fact is so clearly preponderant or of such a conclusive character that the court would be bound, in the exercise of a sound judicial discretion, to set aside a finding in opposition to it, it is the duty of the court to withdraw the question from the jury and direct their finding; and thus, *before the question of fact is submitted to the jury, a preliminary question of law always arises for the decision of the court, and that question is not whether there is literally no evidence, but whether there is any substantial evidence, the consideration of which is properly within the province of the jury*" (citing numerous decisions of this and lower Federal Courts). (Italics ours.)

Clearly, when an Appellate Court corrects an erroneous decision of this preliminary question by the trial judge, the error corrected is the error of the court, not the jury. The province of the jury is not invaded. Such procedure in no wise contravenes the Seventh Amendment.

This view was entertained, at least impliedly, by the Circuit Court of Appeals for the Second Circuit in *Hoffman* v. *American Mills Co.* (288 Fed. 768, certiorari denied, 263 U. S. 701). Upon the trial of that case, the Court submitted the issues to the jury, reserving decision of a motion to dismiss the complaint. After verdict in the plaintiff's favor, the complaint was dismissed, but the verdict itself permitted to stand. The trial judge stated that if he were wrong, the Appellate Court might direct judgment on the verdict and thus avoid a new trial.

The Circuit Court of Appeals reviewed the dismissal of the complaint, and finding it erroneous, directed judgment upon the verdict. It said (p. 773):

> "We think it would not be a breach of the Seventh Amendment of the federal Constitution to order the verdict reinstated. In *Slocum* v. *New York Life Ins. Co.*, * * * the verdict was set aside and judgment directed, dismissing the complaint. This was held to be in violation of the Seventh Amendment. But in the case at bar, the court expressly refused to set aside the verdict. The right of jury trial was therefore accorded the defendant *and our determination here in no wise re-examines the facts tried by the jury.*" (Italics ours.)

If the Circuit Court of Appeals had *upheld* the dismissal below as *proper*, would it, in any greater sense have "re-examined the facts tried by the jury?" Or, if the dismissal below had been erroneously denied and the Circuit Court of Appeals had corrected the error by directing such dismissal, would its determination have involved a re-examination of "the facts tried by the jury?" These questions answer themselves. In the case cited the appellate court asserted and exercised its power to review the disposition by the trial court of a motion to dismiss the

complaint decided after verdict for the plaintiff and to direct judgment accordingly. Yet it refused to do this very thing in the case at bar.

The practice which petitioner urged for adoption by the Circuit Court of Appeals for the Second Circuit has been employed in the Sixth and Eighth Circuits. In *Knight* v. *Illinois Central Railroad Co.* (180 Fed. 368), suit was brought in the United States Circuit Court for the Western District of Kentucky to recover damages for death through negligence. At the close of the evidence the trial judge directed a verdict for the defendant and judgment was entered thereon, the Court refusing to permit the plaintiff to submit to non-suit. The Circuit Court of Appeals for the Sixth Circuit held the plaintiff was entitled to submit to non-suit, and accordingly reversed the judgment. In so doing, it said (p. 374):

> *"The practice, however, does not require a new trial, but only a direction that upon the setting aside of the judgment the plaintiff's motion to dismiss without prejudice be sustained. Vertrees* v. *Newport News, etc. R. R. C.*, 95 Ky. 318, 25 S. W. 1; *Francisco* v. *Chicago & Alton Ry. Co.* (8th Circuit), 149 Fed. 354, 360, 79 C. C. A. 292." (Italics ours.)

Similar procedure was followed by the Circuit Court of Appeals for the Eighth Circuit in *Francisco* v. *Chicago & A. R. Co.* (149 Fed. 354). This was a suit instituted in the Circuit Court of the United States for the Eastern District of Missouri to recover damages for wrongful death. At the close of the evidence, the trial court instructed the jury to return a verdict for the defendant; but before the jury retired, plaintiff requested and was granted permission to take an involuntary non-suit. Subsequently, the plaintiff moved to set aside this judgment of non-suit and prayed

a new trial. The motion was denied, and from this order plaintiff appealed. The Circuit Court of Appeals upheld the procedure below in all respects, but finding that the judgment was so worded as to appear to be a judgment on the merits, said (p. 360):

> "For this reason alone the judgment will be reversed, the defendant in error will recover its costs in this court, and the case will be remanded to the Circuit Court, *with directions to render a judgment that the action be dismissed without prejudice to the right of the plaintiff to maintain another for the same cause, and that the defendant recover its costs of the plaintiff, and it is so ordered.*"

It is significant that in neither of these cases was it even suggested that the direction of a non-suit, without prejudice, infringed any constitutional right.

Concededly, in actions at law tried before a jury, if it appears upon appeal that, although the judgment appealed from was erroneous, there remains an issue of fact to be determined before the proper judgment can be rendered, a new trial must be ordered so that the disputed question may be decided by the jury. So much is required by the Seventh Amendment. This is the precise holding of the *Slocum* case. But it is submitted, that in cases wherein, as here, the trial court should have disposed of the case without submitting it to the jury at all, either by dismissing the complaint or by directing a verdict, the appellate court should be empowered to direct the entry of the judgment which the trial judge should have ordered, without the useless formality, delay and expense involved in remanding the case for a new trial of a non-existing issue.

SECOND POINT.

The decision of the Circuit Court of Appeals is contrary to the strictly limited interpretation placed upon the *Slocum* case by subsequent decisions of this Court and lower federal tribunals.

The *Slocum* case was decided over twenty years ago. Four justices dissented. The vigorous minority opinion was rendered by the present Chief Justice. Of the other members of this Court as then constituted, but one remains. We feel justified in saying that lesser Federal Courts are looking to this tribunal, as presently constituted, for a salutary limitation of, if not a departure from, the technical common law formalism read into the Constitution by the *Slocum* case. This very hope was expressed by the District Court of the United States for the District of Minnesota, in *Glynn* v. *Krippner* (47 F. (2d) 281, at 283):

> "It seems to me very probable that the Supreme Court of the United States as now constituted is unlikely to hold again that the constitution prohibits the granting of judgment notwithstanding the verdict.
>
> * * * * * * * * * *
>
> I hope that the Court of Appeals may see fit to certify the question of the right of a federal court to grant such judgment where the laws of the state permit that practice, to the Supreme Court of the United States for reconsideration."

In the same case, the Circuit Court of Appeals for the Eighth Circuit (60 F. (2d) 406, 409), admitted that "the dissenting opinion in the *Slocum* Case seems to us, as it seemed to the trial judge, convincing", but held that the particular question involved, having once been decided

by this Court, could not be certified for reconsideration; at the same time it pointed out (p. 410):

> "If, for any cause, the supreme court may wish to reconsider the question,—an application to that tribunal to cause the record in the present case to be certified up to it may afford the appellant the remedy he seeks. For this court there is nothing to do but to affirm the judgment on the authority of the case cited * * *."

Unfortunately, there is no record of such a petition for *certiorari* having been filed.

As recently as May 8, 1933, the *Slocum* case was severely criticized and rigidly limited to its precise facts by the District Court for the Southern District of New York in *Isaacson* v. *United States* (3 Fed. Supp. 350). There, the trial court denied defendant's motion for a directed verdict and submitted the issues to the jury, which subsequently reported its inability to agree. Thereupon it was directed to return a verdict for the defendant. Plaintiff then asked that the verdict be set aside and a new trial ordered, on the ground that the action of the court violated his rights under the Seventh Amendment.

In denying the motion, Judge Knox distinguished the *Slocum* case and continued (p. 351):

> "In addition, it should be noted that three justices of the Supreme Court concurred with the present Chief Justice, in dissenting from the decision in the *Slocum* case, and that the majority view has been subjected to vigorous attack by various textwriters. See Schofield, New Trials and the Seventh Amendment, 8 Ill. L. Rev. 287, 381, 465; Thorndike, Jury Trials in the United States Courts, 26 Harv. L. Rev. 732; Committee of the American Bar Association, Proceedings, 1913, XXXVIII, 561.

> *These factors are conducive to a narrow interpretation of the Slocum case, rather than to an extension of its doctrine to cover such a situation as is presented by the case at bar * * *. Common sense dictates that the labor and expense of a new trial should not have to be undergone merely because an erroneous ruling was made, where the court, upon further consideration, can correct such ruling.* In my opinion the Seventh Amendment, as applied in *Slocum* v. *New York Life Insurance Co., supra,* does not deprive the court of this power." (Italics ours.)

The construction given the Seventh Amendment by this court in the *Slocum* case, decided in 1913, and in *Gasoline Products Co., Inc.* v. *Champlin Refining Co.* (283 U. S. 494), decided in 1931, form a startling contrast. In the *Slocum* case this court held that the Seventh Amendment not only preserved the substance of the right to trial by jury, but as well the common law procedural rules governing the right. Discussing the clause: "and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law", it adopted the language of *Parsons* v. *Bedford* (3 Pet. 433), decided in 1830 (p. 378):

> "This is a prohibition to the courts of the United States to re-examine any facts tried by a jury *in any other manner.* The only *modes* known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo,* by an appellate court, for some error of law which intervened in the proceedings." (Italics ours.)

Again (p. 379), it approved unreservedly the holding of *Capital Traction Co.* v. *Hof* (174 U. S. 1, 13), decided in 1899 to the effect:

> "that, when a trial by jury has been had in an action

at law, in a court either of the United States or of a State, the facts there tried and decided cannot be re-examined in any court of the United States, *otherwise than according to the rules of the common law of England;* that by the rules of that law, no other *mode* of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted *in one of those two ways,* facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States." (Italics ours.)

Finally, this Court itself concluded (pp. 379-380):

"These decisions make it plain, first, that the action of the Circuit Court of Appeals in setting aside the verdict and assuming to pass upon the issues of fact and to direct a judgment accordingly must be tested *by the rules of the common law.*" (Italics ours.)

Contrast this interpretation with that contained in *Gasoline Products Co., Inc.* v. *Champlin Refining Co.* (283 U. S. 494). There the jury returned a verdict for the plaintiff. The Court of Appeals reversed because of errors in the charge of the trial court as to the measure of damages. In directing a new trial, however, it restricted the issues to the determination of damages only. It was contended that this procedure constituted a denial of the right to trial by jury, and more specifically, that, since by the rules of the common law, there could be no new trial of a part only of the issues of fact, a resubmission to the jury of the issue of damages alone, was denial of the trial by jury which the Seventh Amendment guarantees.

Mr. Justice Stone dealt with this contention, as follows (pp. 497-498):

> *"It is true that at common law there was no practice of setting aside a verdict in part.* If the verdict was erroneous with respect to any issue, a new trial was directed as to all. * * *
>
> Lord Mansfield, in applying the common law rule where the verdict, correct as to one issue, was erroneous as to another, said: "* * * for form's sake, we must set aside the whole verdict * * *" *Edie* v. *East India Co.*, 1 W. Bl. 295, 298. *But we are not now concerned with the form of the ancient rule. It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance.* All of vital significance in trial by jury is that *issues of fact* be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law * * *. *Beyond this the Seventh Amendment does not exact the retention of old forms of procedure."* (Italics ours.)

The Court referred to the *Slocum* case and used language strictly limiting that decision to the precise situation there presented (p. 499). It said that the *Slocum* case

> "decided *only* that an appellate federal court may not direct judgment *non obstante veredicto, solely* because the verdict given is not sustained by the evidence, but *in that event* must order a new trial. There it was held that the Seventh Amendment does not permit the entry of judgment on a trial at law before a jury *upon an issue of fact,* without the verdict of the jury." (Italics ours.)

It is submitted that this Court has thus cast aside the narrow and technical construction given by the *Slocum* case to the Seventh Amendment which, for two decades,

has clothed that constitutional provision with all the cumbersome trappings of an ancient code of civil procedure, to the notorious impairment of substantial right, and which has compelled our Federal courts, against their rebellious common sense, to apply to modern law-suits a tortuous machinery invented centuries past. We ask that this Court apply an enlightened and liberal constitutional philosophy to the case at bar.

While the precise holding of the *Slocum* case need not be overruled on this appeal, that decision may at least be rigidly limited to the narrow confines of the situation there presented, which, as we have pointed out, is substantially different from that obtaining in the instant case.

THIRD POINT.

The *dictum* of the *Slocum* decision that compulsory non-suits were unknown to the common law and therefore not permitted in Federal courts under the Seventh Amendment, should not be adopted as a rule of law by this Court.

The majority opinion in the *Slocum* case states (p. 392):

> "A nonsuit at common law was a dismissal of the plaintiff's action without an adjudication, other than the imposition of costs, and constituted no bar to another action for the same cause * * *. But unless he assented to being non-suited on the evidence it was essential that a verdict be taken, even although it was certain to be against him. In other words, such a nonsuit was always voluntary, and never compulsory."

The Court then concludes (p. 394):

> "It being thus certain that the common law rules in respect of nonsuits recognized that the plaintiff had a right to have the verdict of the jury taken,"

it follows that the Seventh Amendment, perpetuating as it does the common law modes of procedure, does not permit a compulsory nonsuit in either trial or appellate courts of the United States.

1. *The dictum is contra to controlling decisions of this Court which have been followed and applied by lower Federal courts.*

As previously suggested (*infra*, p. 5), this Court has expressly held that a compulsory nonsuit for failure of proof may be directed by a District Judge pursuant to a local territorial statute without violation of the Seventh Amendment. *Coughran* v. *Bigelow* (164 U. S. 301). This decision anticipated and effectually answered the *dictum* of the *Slocum* case that compulsory nonsuits were unwarranted at common law. Referring to the earlier decisions of this Court in *Elmore* v. *Grymes* (1 Pet. 469); *Crane* v. *Morris* (6 Pet. 598), and *Castle* v. *Bullard* (23 Howard 172), holding that a Federal trial court had no authority to order a peremptory nonsuit against the will of the plaintiff, Mr. Justice Shiras, writing for a unanimous bench, remarked that those cases "were based, *not upon the constitutional right of a plaintiff to have the verdict of a jury, even if his evidence was insufficient to sustain his case, but upon the absence of authority, whether statutory or by a rule promulgated by this court;*" and, as warrant for this view, the learned justice points to *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, wherein "a judgment of the Circuit Court of the United States for the Eastern District of Pennsylvania, ordering a peremptory nonsuit, in pursuance of a state statute, was upheld."

These decisions have never been overruled, but on the contrary, have been consistently adhered to and applied by lower Federal courts throughout the nation. *Boudrot* v. *Cochrane Chemical Co.*, 110 Fed. 919; *Priestly* v. *Provi-*

dent Savings Co., 112 Fed. 271; *Gentry* v. *Singleton*, 128 Fed. 679; *Chicago & Northwestern Railway Co.* v. *Andrews*, 130 Fed. 65; *Swift & Co.* v. *Johnson*, 138 Fed. 867; *Huntt* v. *McNamee*, 141 Fed. 293; *Parks* v. *Southern Railway Co.*, 143 Fed. 276; *Fadley* v. *Baltimore & Ohio R. Co.*, 153 Fed. 514; *Knight* v. *Illinois Central R. Co.*, 180 Fed. 368; *Russo-Chinese Bank* v. *National Bank of Commerce*, 187 Fed. 80; *Board of Comm'rs of City & County of Denver* v. *Home Savings Bank*, 200 Fed. 28; *Shank* v. *Great Shoshone & Twin Falls Water Power Co.*, 205 Fed. 833; *Neil Bros. Grain Co.* v. *Hartford Fire Ins. Co.*, 1 F. (2d) 904; *Burden et al.* v. *Robertson*, 7 F. (2d) 266; *Stapleton* v. *Reading Co.*, 26 F. (2d) 242; *Julius Klugman's Sons, Inc.* v. *Oceanic Steam Navigation Co.*, 42 F. (2d) 461; *Ellerson* v. *Grove et al.*, 44 F. (2d) 493; *Dulion* v. *S. A. Lynch Enterprise Finance Corporation*, 53 F. (2d) 568; *McNabb* v. *Virginian Ry. Co.*, 55 F. (2d) 137; *MacLachlan* v. *Perry*, 68 F. (2d) 769.

Of these cases, the following deserve special attention: *Shank* v. *Great Shoshone & Twin Falls Water Power Co.* (205 Fed. 833), in which the Circuit Court of Appeals, Ninth Circuit, decided that a compulsory nonsuit was proper in a Federal District Court, if permitted by local state practice; *Stapleton* v. *Reading Co.* (26 F. (2d) 242), wherein the Third Circuit Court of Appeals affirmed a compulsory nonsuit granted by the District Court for the District of New Jersey; *Fadley* v. *Baltimore & Ohio R. R. Co.* (153 Fed. 514), which affirmed a compulsory nonsuit granted by the District Court for the Western District of Pennsylvania; *Neil Bros. Grain Co.* v. *Hartford Fire Ins. Co.* (1 F. (2d) 904), in which the Ninth Circuit Court of Appeals affirmed an order of judgment for the defendant entered by the District Court for the Eastern District of Washington; and *Dulion* v. *S. A. Lynch Enterprise Finance Corporation*, (53 F. (2d) 568), wherein the Fifth Circuit

Court of Appeals affirmed a compulsory nonsuit granted by the District Court in Georgia under a Georgia statute authorizing such trial procedure. Authorities in the Second Circuit have been previously discussed (*infra*, p. 7).

In *Parks* v. *Southern Ry. Co.* (143 Fed. 276), at the conclusion of plaintiff's case, the defendant moved for a directed verdict. The motion was argued and was then granted by the trial judge. Thereupon, plaintiff asked leave to take a *voluntary nonsuit*, which the court *declined to permit*. Its refusal was assigned as error. The Circuit Court of Appeals, Fourth Circuit held (p. 277):

> "that under the circumstances it was within the discretion of the court to either permit the plaintiff to take a non-suit or to direct a verdict in favor of the defendant in error."

The reason and policy behind the rule was thus stated (pp. 279-280):

> "It is highly important that the court in the exercise of its discretion should not only see that equal and exact justice is done between litigants, but it is equally important that needless litigation should be speedily determined, and in the trial of cases the court should consider the rights of the defendant as well as those of the plaintiff, and where it appears that all the evidence which it is possible to obtain has been offered and the case has been submitted to the jury or to the court it is the duty of the court, if in its opinion the evidence is not sufficient to justify a verdict in favor of the plaintiff, to direct the jury to return a verdict in favor of the defendant. The courts are not organized for the purpose of permitting the plaintiff in an action to experiment with a certain state of facts for the purpose of ascertaining the opinion of the court as to the law

> applicable to the same and then permit him to withdraw from the scene of conflict and state a new cause of action and mend his licks in another direction. Such policy, if adopted, would be productive of much mischief, and should not be tolerated."

It is noteworthy that the element stressed in this case, was not the right of the plaintiff to take a voluntary nonsuit and sue again, but the right of the defendant, *over plaintiff's objection*, to insist upon a binding adjudication of the merits and a termination of the litigation.

In the light of these precedents it is improper to say that a compulsory nonsuit is not permissible in Federal courts under the Seventh Amendment; and it is respectfully submitted that the settled rules of practice which have thus become so deeply imbedded in our Federal judicial procedure should not be abandoned for a mere *dictum* of doubtful validity.

2. *Adoption of the dictum as law will introduce patent inconsistency into the rules of Federal Trial Procedure.*

It is conceded by the majority in the *Slocum* case that a Federal Trial Judge has power to direct a verdict when a contrary verdict would be set aside; and this, even though there may be technical issues of fact presented by the pleadings, provided there is no evidence upon which the jury can properly find a different verdict than that directed. *Pleasants* v. *Fant*, (22 Wall. 116, 120); *Pennsylvania R. R. Co.* v. *Chamberlain* (288 U. S. 333, 343).

Now the doctrine that federal courts have no power to nonsuit a plaintiff without his consent for want of evidence to support his case, and the established rule that federal courts have power, without the consent of the plaintiff, to direct a verdict for the defendant on a material issue of fact, when the plaintiff's evidence is not enough to support his case, are hopelessly irreconcilable. To deny the one power and affirm the other seems to be inconsistent.

In speaking of involuntary nonsuits and directed verdicts, Mr. Justice Field, in *Oscanyon* v. *Arms Co.* (103 U. S. 261, 264), said:

> "The difference in the two modes is rather a matter of form than of substance, except in the case of a nonsuit, a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted either upon motion or upon appeal."

A fact found by a peremptorily directed verdict cannot be a "fact tried by a jury" within the meaning of the Seventh Amendment; and it is strange to say that the verdict of a jury returned in passive obedience to the compulsion of a trial judge constitutes *their* determination of the issues presented either by the pleadings or the evidence.

If the court may thus take a case away from the jury, and, with their purely mechanical cooperation, decide the issues himself, without violating the Seventh Amendment, it is illogical to say that he may not direct a compulsory nonsuit for failure of proof.

Indeed, under the Seventh Amendment, a compulsory nonsuit, which leaves the merits undecided and the plaintiff free to sue again, does not seem as objectionable as a directed verdict, which determines the merits and precludes further litigation.

It is equally inconsistent to bar nonsuits in Federal Courts, because unknown to the common law, and at the same time to permit directed verdicts in those tribunals under the Seventh Amendment. It is settled that the "common law" referred to in the Seventh Amendment is the common law of England, and not the common law of any State or of all the States (*United States* v. *Monson*, 1 Gall. 5, 20). By the common law of England is meant so much of that common law as prevailed at the time the Seventh

Amendment was proposed by Congress, September 25, 1789, and declared in force, December 15, 1791 (Warren, History of the American Bar; 1, Select Essays on Anglo-American History, 367).

The practice of moving the trial judge for a directed verdict on a material issue of fact did not become familiar practice in the English Courts until *after* the proposal and adoption of the Seventh Amendment.

Thus, in *Gibson* v. *Hunter*, (2 H. Bl. 187), decided in 1793), Lord Eyre said (p. 205):

> "The admissibility of the evidence being established, the question *how far* it conduces to the proof of the fact which is to be ascertained, is not for the judge to decide, but for the jury exclusively; with which judges interfere in no case, but where they have in some sort substituted themselves in the place of the jury in attaint upon motions for new trials."

As late as 1824, in *Bulkeley* v. *Butler* (2 B. & C. 434), on error to the Common Pleas, and 1826, in *Viner* v. *Corporation of Reading* (1 Y. & J. 4), on error to the King's Bench, the practice of moving the trial judge for a directed verdict on a material issue of fact was sustained, but evidently was regarded as novel and doubtful.

In 1794, the charge of Jay, *C. J.*, to the jury in *Georgia* v. *Brailsford* (3 Dallas 1)—a jury trial in the Supreme Court under its original jurisdiction—indicates that none of the members of that Court as then constituted knew of the practice of directing a verdict on a material issue of fact.

The practice of directing a verdict in Federal courts was not definitely sustained until 1850 in *Parks* v. *Ross*, (11 How. 362, 373); and the last attack upon the practice was made in *Pleasants* v. *Fant* (22 Wall. 116) in 1874.

If, under the Seventh Amendment, Federal courts are to be rigidly restricted to the "rules of the common law" prevailing at the time of its adoption, directed verdicts must be barred as unconstitutional. At least, consistency compels either the condemnation or approval of *both* compulsory non-suits and directed verdicts under the Seventh Amendment; it does not permit choice between the two.

If for no other purpose than that of consistency, therefore, compulsory non-suits should be held permissible under the Seventh Amendment; and the contrary *dictum* of the *Slocum* case may be explicitly disapproved.

3. *The dictum has no substantial foundation in the Common Law.*

In reaching its conclusion that a compulsory nonsuit was not allowable at common law, the majority in the *Slocum* case point to the fact that unless a party "assented to being non-suited on the evidence it was essential that a verdict be taken, even though it was certain to be against him. In other words, such a compulsory non-suit was always voluntary, and never compulsory" (pp. 392, *et seq.*).

In this connection, it must be remembered that as early as 1665, the English courts were clothed with judicial power to grant a new trial after a false verdict against the weight of the evidence (*Bright* v. *Enyon,* 1 Burrow 390, 394, 3 Bl. Com. 388). This procedure succeeded the old writ of attaint, whereby a jury of twenty-four re-examined the verdict returned by a jury of twelve, and, if found false, the verdict of the twenty-four was substituted in its place. In 1757 Lord Mansfield said: "The writ of attaint is now a mere sound in every case" (*Bright* v. *Enyon,* 1 Burrow 390, 394; 3 Black. Com. 388).

Thus, before the proposal and adoption of the Seventh Amendment, and at least since 1757, the remedy of attaint for a false verdict had given way to the motion for a new

trial on the specific ground that the verdict was false and against the weight of the evidence.

It is thus apparent that the consent of the plaintiff to a non-suit at common law was a mere fiction. For, in view of the trial court's power to grant a new trial when, in his opinion the verdict was against the weight of the evidence, only a foolhardy plaintiff would insist on the verdict of the jury, for him or against him, when the trial judge strongly recommended consent of the plaintiff to a non-suit for want of evidence to support his case. If the plaintiff happened to win a verdict, it was certain the Court would order a new trial. If, on the other hand, the verdict favored the defendant, the plaintiff was concluded upon the merits and forever denied the opportunity of another day in court (*cf.* Schofield, New Trials and the Seventh Amendment, 8 Ill. Law Review 305).

It is undeniable that when the Seventh Amendment was proposed and adopted, a plaintiff in an English Court did have the technical common law "right" to the verdict of a jury, for him or against him, even though his case was devoid of a scintilla of evidence to sustain it. But, the question arises: Should this so-called common law "right" of a stubborn plaintiff to a jury verdict, be made the standard and measure of the constitutional right to trial by jury in the Federal courts under the Seventh Amendment? This Court has correctly answered in the negative (*Coughran* v. *Bigelow*, 164 U. S. 301).

FOURTH POINT.

The District Court erroneously denied petitioner's motions to dismiss the complaint for lack of proof.

In the ensuing consideration of the record, we have omitted extended discussion of the fact that the respondent's version of the alleged accident was *wholly uncor-*

roborated, inherently unconvincing (R., pp. 61-118, fols. 78-126, 127-144), and *actually contradicted* in important particulars by the Chief Officer (R., pp. 36-61, fols. 50-77) and Chief Steward (R., pp. 187-197, fols. 230-241); and the fact that the respondent, by his own conduct and his contradictory statements to petitioner's representative (R., pp. 264-268, fols. 326-332; Deft.'s Exhs. B and C), and to the physicians in the hospital to which he was confined (R., p. 16, fol. 25; pp. 148-149, fols. 182-184; p. 151, fol. 186) discredited completely his story on the witness stand. These phases of the evidence have been so fully dealt with in the prevailing opinion below, (70 F. (2d) 635-638) that we have not discussed them here. Discussion has been restricted to the conceded and uncontradicted facts and to the medical testimony of both parties, because it is felt that in the light thereof no triable issue of fact was presented for the jury to determine.

1. *The conceded and undisputed facts.*

The following salient features of this case are to be noted:

1. The *conceded fact* that respondent's injuries, if sustained at all, occurred on *February 13, 1930* (R., p. 65, fol. 82).

2. The *conceded fact* that respondent was received at the hospital on *February 21, 1930* (R., p. 269, fol. 333; Deft.'s Exh. D).

3. The *conceded fact* that respondent was *syphilitic* (R., p. 15, fol. 23).

4. The *uncontradicted testimony* that respondent was *alcoholic* (R., p. 148, fol. 183).

5. The *uncontradicted hospital finding* that upon his admission to the hospital, respondent was afflicted with *syphilitic degeneration of the arteries* (R., p.

16, fol. 24; p. 19, fol. 28; pp. 159-160, fols. 196-198; pp. 220-221, fols. 268-269; pp. 234-235, fol. 285).

6. The *uncontradicted hospital finding* that, upon admission to the hospital respondent's left foot had become affected with a *dry gangrene* (pp. 18-19, fols. 28-29; pp. 151-153, fols. 186-188; p. 219, fol. 267; p. 231, fol. 281).

7. The *conceded fact* that respondent bathed his foot in *hot water* on February 13, 1930 (R., p. 68, fol. 85; pp. 84-88, fols. 105-109); and, on the evening of February 14, 1930, *walked* the streets of Brooklyn until midnight (R., pp. 71-72, fols. 89-90); pp. 93-94, fols. 114-116; pp. 189-193, fols. 233-237).

8. The *unanimous and uncontradicted hospital* opinion that the dry gangrene, necessitating amputation, developed spontaneously from systemic, syphilitic degeneration of the arteries,—endoarteritis,—which may have been precipitated by either the application of hot water or exposure to dampness and cold (R., p. 16, fol. 24; p. 19, fol. 28; p. 152, fol. 187; pp. 160-161, fols. 197-199; pp. 220-221, fols. 268-269; pp. 234-235, fols. 285-286).

9. The fact that Dr. Newstadter, respondent's own expert, *conceded* that the hospital theory of causation is medically competent (R., p. 126, fol. 155; p. 132, fol. 161).

2. *Respondent's own medical testimony failed to show any causal connection between the alleged injury and the amputation.*

To establish his theory of causation, respondent called as witnesses two physicians: Dr. Wikle and Dr. Newstadter. Dr. Wikle was a member of the hospital staff at the time of respondent's confinement there and actually

observed and treated his condition (R., pp. 12-13, fols. 19-22). Dr. Newstadter never treated respondent, and examined him for the first time on January 30th and 31st, 1933, two years after the alleged injury, and long after respondent's leg had been amputated (R., p. 119, fol. 145). The examination was made at the request of respondent's counsel, for the purpose of giving expert testimony at the trial (R., p. 126, fol. 154).

Dr. Wikle's testimony is *uncontradicted* and therefore, *conclusive* upon the respondent, whose witness he was, regarding the following *matters of fact:*

1. Respondent's foot was affected with a *dry* gangrene (R., pp. 18-19, fols. 27-28; p. 29, fol. 41).

2. There was no evidence of a wound or traumatic injury of any kind anywhere on respondent's foot when Dr. Wikle examined it on February 22, 1930, *nine* days after such an injury is alleged to have occurred (R., p. 16, fol. 25; p. 18, fol. 27).

3. A periarterial sympathectomy was performed on the main artery of the left thigh by Dr. Wikle on February 24, 1930 (R., p. 13, fol. 22).

4. The left leg was not amputated until April 17, 1930, *two months* after the alleged injury (R., p. 14, fol. 23).

Respondent's witness, Dr. Wikle, is *confirmed* and *substantiated* by respondent's expert, Dr. Newstadter, with regard to the following *matters of professional theory:*

1. A wound such as respondent described, an inch and a half long, sufficient to produce infectious gangrene would be visible within *ten days,* or even *two weeks* after it had occurred (Wikle, R., pp. 16-18, fols. 25-27; p. 29, fol. 41; Newstadter, p. 135, fol. 165; p. 137, fol. 167).

2. The absence of such a wound within *ten days* or *two weeks* after it had been inflicted would indicate, that *even though sustained, it had not produced* the subsequent gangrene and that some *other cause* had produced it (Wikle, R., p. 23, fol. 34; p. 36, fol. 49; Newstadter, p. 135, fol. 165).

3. A periarterial sympathectomy is *never* performed in cases of gangrene resulting from a *wound infection* (Wikle, R., pp. 19-20, fols. 29-30; Newstadter, pp. 130-131, fols. 159-160).

4. In cases of gangrene resulting from a *wound infection*, amputation is *immediately imperative* to save life, and delay in amputating is fatal (R., p. 133, fol. 162).

5. Dry gangrene is produced by syphilitic arthritis, or syphilitic endo-arteritis *spontaneously* without requiring the infliction of any external injury (Wikle, R., pp. 18-19, fols. 27-29; p. 25, fol. 26; Newstadter, p. 128, fol. 155).

The dogmatic assertion of Dr. Newstadter, in answer to a hypothetical question, *which did not inform him that the gangrene was dry,* that gangrene may be produced by wound infection as a competent producing cause (R., pp. 119-121, fols. 146-149) may be disregarded.

As was said in *Noble* v. *C. Crane & Co.,* (169 Fed. 55, 59-60):

> "The conflict must be real, not merely apparent. A mere dogmatic assertion, which does not appeal to the reason of the Court, which does not have substance and relative consequence, which does not have fitness to induce conviction, *is not proof, even if uncontradicted* * * *." (Italics ours.)

We respectfully urge that, giving to the respondent the advantage of every inference that can properly be drawn

from the conceded and established facts, nevertheless the testimony of Doctors Wikle and Newstadter, respondent's witnesses, when taken together, not only fails to make out a *prima facie* case of responsibility against the petitioner, but indeed establishes that the dry gangrene requiring amputation did not result from a wound infection as a competent producing cause.

The respondent, therefore, should have been non-suited and the complaint dismissed at the close of his case.

A non-suit, under such circumstances, is permitted by the settled trial practice prevailing in the New York courts (*Kraus* v. *Birnbaum*, 200 N. Y. 130; *Colt* v. *Sixth Ave. R. R. Co.*, 49 N. Y. 671; *Ozagar* v. *Pierce Mfg. Co.*, 134 App. Div. 800; *Migel* v. *Heller Hirsch & Co.*, 151 App. Div. 637).

3. *At the close of the entire case, the evidence was simply overwhelming in favor of petitioner on the issue of proximate cause.*

I

Petitioner, as part of its case, called Dr. Perez, who first examined respondent upon his admission to the hospital, and transcribed into the hospital records respondent's history of the beginning and development of his malady (R., pp. 146-147, fols. 180-181); Dr. Charache, who attended respondent almost daily from his admission to, until his discharge from the hospital (R., pp. 216-217, fols. 263-264); and Dr. Shatara, who amputated respondent's left leg on April 17, 1930 (R., p. 233, fols. 283-284).

Dr. Perez, Dr. Charache, Dr. Shatara, all personally familiar with the facts, substantiated Dr. Wikle's diagnosis of the disease as *dry gangrene*. All of them confirmed Dr. Wikle's finding of *syphilis* (R., pp. 151-153, fols. 186-188; p. 219, fol. 267; p. 231, fols. 281).

All of them verified Dr. Wikle's statement that there

was *degeneration of the arteries and impairment of circulation.* Two of them, Dr. Charache and Dr. Shatara offered factual evidence of this when they testified that in performing the amputation there was so little bleeding that the usual tourniquet was dispensed with (R., p. 221, fol. 269, p. 233, fol. 284).

None of them, throughout their long connection with the case ever observed *a wound or traumatic injury of any kind to the affected foot,* and they confirmed Dr. Wikle again in this respect (R., p. 149, fol. 184; p. 219, fols. 266-267; p. 222, fol. 271; p. 232, fols. 282-283).

None of them ever heard respondent *complain* of such an injury. On the contrary, they are all positive that he told them he had suffered *a sudden pain in his left foot, had bathed it in hot water and had then developed dry gangrene* (R., p. 148, fols. 182-183; p. 151, fol. 186; p. 219, fol. 266; p. 220, fol. 268; pp. 234-235, fol. 285).

Dr. Perez and Dr. Shatara, the one house surgeon, the other Chief of the Surgical Staff at the Cumberland Hospital, subscribed without qualification to the doctrine announced by both Dr. Wikle and Dr. Newstadter that a *peri-arterial sympathectomy is never performed in cases of gangrene resulting from a wound* (R., p. 153, fol. 188; pp. 231-232, fol. 282).

Moreover, Dr. Perez and Dr. Shatara testified that in cases of wound-infectious gangrene *immediate amputation is imperative to save life.* In this they were upheld by respondent's own expert, Dr. Newstadter. It is undisputed that respondent's leg was not severed until April 17, 1930, more than *two months* after his admission to the hospital, and then, *not to save his life,* but simply to remove the useless limb. Had he been afflicted with a moist gangrene, this delay would have been fatal. The fact that he still lives despite the delay in amputation, explodes his contention that this was an infectious gangrene resulting

from trauma (R., p. 133, fol. 162; p. 153, fols. 188-189; p. 234, fols. 284-285).

Drs. Perez, Charache and Shatara all concur in distinguishing between the essential nature of *dry* and *moist* gangrene. Unanimously, they affirm Dr. Wikle's opinion that dry gangrene *never* results from traumatic injury as a competent producing cause; and all agree that the dry gangrene observed by them *did not* and *could not* have resulted from a nail injury (R., p. 162, fols. 199-200; pp. 222-223, fol. 271; pp. 232-233, fols. 282-283).

They go further and constructively assign a cause. They all diagnose the case a *dry gangrene, spontaneously produced by endo-arteritis, or syphilitic degeneration of the arteries, with or without a possible precipitation by exposure to heat or cold.* Dr. Newstadter, petitioner's expert, concedes that this medical theory is not impossible. The theory itself accords with the established facts (R., pp. 32-34, fols. 45-47; p. 227, fol. 277; pp. 234-235, fol. 285).

With the proof in this state, the trial court should have dismissed the complaint (*Kraus* v. *Birnbaum*, 200 N. Y. 130; *Colt* v. *Sixth Avenue R. R. Co.*, 49 N. Y. 671; *Cragar* v. *Pierce Mfg. Co.*, 134 App. Div. 800; *Migel* v. *Heller Hirsch & Co.*, 151 App. Div. 637; *Grace* v. *Fassoit*, 67 App. Div. 443).

Under the settled New York Practice a dismissal *on the merits* would have been proper. "A dismissal of a a complaint * * * at the close of the plaintiff's * * * evidence, or a dismissal of the complaint * * * at the close of the whole evidence, is a final determination of the merits of the cause of action * * * unless the court shall dismiss without prejudice" (*New York Civil Practice Act*, Section 482). Under the Conformity Act, a Federal District Court sitting in New York may do likewise unless forbidden by the Seventh Amendment (Revised Statutes, Section 914; 28 United States Code Annotated, Section 724).

If what has heretofore been said is correct (Points I-III), the Circuit Court of Appeals should have directed the dismissal which the District Court erroneously denied.

LAST POINT.

The judgment of the Circuit Court of Appeals should be modified by eliminating therefrom the requirement of a new trial and substituting therefor a direction to enter judgment dismissing the complaint.

Respectfully submitted,

GEO. WHITEFIELD BETTS, JR.,
Counsel for Petitioner,
120 Broadway,
New York City.

WILLIAM R. MEAGHER,
Of Counsel.

INDEX.

PAGE

Statement 1

FIRST POINT—The question whether the District Court should have dismissed the complaint on the merits or without prejudice, was presented by the record to the Circuit Court of Appeals..... 1

SECOND POINT—This Court has power, on this record, to direct a dismissal on the merits..... 6

THIRD POINT—Respondent is not entitled to review by this Court of the decree of the Circuit Court of Appeals and the judgment of the District Court.. 9

TABLE OF CASES CITED:

Alexander v. *Cosden Co.*, 290 U. S. 484 (1934)..... 10

Baker v. *Warner*, 231 U. S. 588, 593 (1913)..... 7, 8

Cabang v. *United States Shipping Board Merchant Fleet Corporation* (2nd Dep't), 227 App. Div. 751 3

Columbia & Puget Sound R. R. Co. v. *Hawthorne*, 144 U. S. 202, 206 (1892)..... 5

Delk v. *St. Louis & San Francisco R. Co.*, 220 U. S. 580, 588 (1911)..... 7, 8

Demarest v. *Westchester Fire Insurance Company of New York* (1st Dep't), 234 App. Div. 556, 560... 3

Hopkins v. *Clark*, 158 N. Y. 299, 304..... 5

PAGE

Italian Star Line, Inc. v. *United States Shipping Board Emergency Fleet Corporation*, 53 F. (2d) 359... 4, 5
Italian Star Line, Inc. v. *United States Shipping Board Emergency Fleet Corporation*, 41 F. (2d) 383, 384 5

Jules Maes & Co., Inc. v. *W. R. Grace & Co.*, 239 N. Y. 519, 520 3

Langnes v. *Green*, 282 U. S. 531 (1931) 7, 10
Littrell v. *Allemania Fire Insurance Co.* (3d Dep't), 224 App. Div. 523..... 3
Lutcher & Moore Lumber Co. v. *Knight*, 217 U. S. 257, 267 (1910) 7

Riley v. *Pierce Oil Corporation*, 245 N. Y. 152..... 2
Riley v. *Pierce Oil Corporation*, 217 App. Div. 744.... 2
Royal Card & Paper Co. v. *Dresdner Bank*, 27 F. (2d) 791 4

Sigua Iron Co. v. *Brown*, 171 N. Y. 488, 505-506..... 5
Slocum v. *New York Life Insurance Co.*, 228 U. S. 364 (1913) 4
Story Parchment Co. v. *Patterson Co.*, 282 U. S. 555 (1931) 10

Union Pacific Railway Co. v. *Daniels*, 152 U. S. 684 (1894) 5

Watts, Watts & Co. v. *Unione Austriaca*, 248 U. S. 9, 21 (1918) 7, 9

Ziegler v. *International Railway Company*, (4th Dep't), 232 App. Div. 43, 44..... 3

STATUTES CITED:

New York Civil Practice Act, Section 482..... 2
United States Revised Statutes, Section 914; 28 U. S. Code Annotated, Section 724..... 3

Supreme Court of the United States

OCTOBER TERM, 1934—No. 178.

BALTIMORE & CAROLINA LINE, INC.,

Petitioner,

—against—

DONALD REDMAN,

Respondent.

REPLY BRIEF FOR THE PETITIONER.

Statement.

Respondent does not argue the merits of the constitutional question presented by this appeal. The Seventh Amendment, its interpretation by the *Slocum* case and, as so interpreted, its application to the case at bar are not discussed. As to this phase of the case, respondent limits himself to the single contention that the state of the record does not permit this Court to determine the question presented. This contention will be shown to be erroneous.

FIRST POINT.

The question whether the District Court should have dismissed the complaint on the merits or without prejudice, was presented by the record to the Circuit Court of Appeals.

Respondent contends that the question as to whether the District Court should have dismissed the complaint

without prejudice was not presented by the record to the Circuit Court of Appeals because: "The trial court was never asked to dismiss 'without prejudice'. That question was never raised in the trial court" (Brief, pp. 9-10).

In this, respondent is mistaken. Upon the trial, at the close of respondent's case, and again, at the end of the entire case, motions were made by petitioner to dismiss the complaint (R., pp. 142-145, fols. 174-178; p. 242, fol. 295). Respondent correctly states that these motions were made for lack of proof (Brief, p. 9).

Each of these was such a motion to dismiss as is governed by Section 482 of the New York Civil Practice Act (cited by respondent), which provides in part as follows:

> "A dismissal of a complaint * * * at the close of the plaintiff's * * * evidence, or a dismissal of the complaint * * * at the close of the whole case, is a final determination of the merits of the cause of action * * * *unless the Court shall dismiss without prejudice.*" (Italics ours.)

Both by its expressed terms, and as interpreted by local authorities, this statutory provision permits the trial court, whenever a motion to dismiss the complaint is made, to dismiss either on the merits or without prejudice, in the exercise of a sound discretion.

Thus, in *Riley* v. *Pierce Oil Corporation*, 245 N. Y. 152, the complaint was dismissed for failure to prove the law of Mexico. The judgment of dismissal was unanimously affirmed by the Appellate Division (217 App. Div. 744). Upon appeal, the Court of Appeals held that the complaint had been properly dismissed for failure of proof in the absence of evidence as to the applicable law of Mexico, and remarked (p. 154):

> "Whether, had such defects in the evidence been

supplied there should have been a dismissal of the complaint, we need not decide. As it stands, the judgment is a final determination on the merits (Civ. Prac. Act, Sec. 482). *The discretion exercised below in this regard we may not disturb.*" (Italics ours.)

In accord: *Jules Maes & Co., Inc.* v. *W. R. Grace & Co.*, 239 N. Y. 519, 520; *Demarest* v. *Westchester Fire Insurance Company of New York* (First Department), 234 App. Div. 556, 560; *Cabang* v. *United States Shipping Board Merchant Fleet Corporation* (Second Department), 227 App. Div. 751; *Littrell* v. *Allemania Fire Insurance Co.* (Third Department), 224 App. Div. 523; *Ziegler* v. *International Railway Company* (Fourth Department), 232 App. Div. 43, 44.

Under the Conformity Act, the District Court, sitting in New York, has like discretion, unless deprived of it by the Seventh Amendment (Revised Statutes, Section 914; 28 U. S. Code Annotated, Section 724).

It is thus clear, that when the petitioner made its motions in the instant case, it, in effect, requested the District Court to dismiss the complaint either upon the merits, or without prejudice, as sound discretion might dictate.

This the trial court declined to do (R., p. 260, fols. 319-320). Its refusal was specifically assigned as error upon appeal to the Circuit Court of Appeals for the Second Circuit (R., p. 272, fol. 339).

Thus, the Circuit Court of Appeals had presented to it by the record the question as to whether or not the District Court should have dismissed the complaint, either on the merits, or without prejudice.

On appeal to that Court the petitioner urged that if the Circuit Court of Appeals should find that the complaint should have been dismissed at any stage of the proceedings below, the judgment should be reversed and the District Court directed to enter judgment dismissing the complaint

without prejudice. That the point was argued and considered by the Circuit Court of Appeals is self-evident from the opinion of that Court wherein it is said (p. 638):

> "We have no power to direct a dismissal without prejudice as the appellant urges. *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364."

While petitioner did not request the Circuit Court of Appeals to direct a dismissal on the merits (because that Court had already decided that the *Slocum* case did not permit it), by clear implication, the Circuit Court of Appeals held itself powerless to direct such a dismissal. For, if, as it decided, it could not constitutionally non-suit the respondent, even with a chance to sue again, it surely would not assert constitutional power to preclude respondent from further suit by the direction of a dismissal on the merits.

Respondent's statement (Brief, p. 10) "that a motion to dismiss 'without prejudice' can only properly be made *in terms* and at the end of the plaintiff's case," is without the citation of any supporting authorities and, indeed, is contrary to established local trial practice.

In *Royal Card and Paper Co.* v. *Dresdner Bank*, 27 F. (2d) 791, a motion for a non-suit was made by defendant and the trial judge reserved decision until after a verdict for the plaintiff, when the motion was granted and the complaint dismissed *upon the merits*. On appeal it was held that although a dismissal *upon the merits* was not permissible, there was no error in disregarding the verdict and granting a dismissal *without prejudice*. The judgment below was accordingly modified.

Identical procedure was upheld as constitutional in *Italian Star Line, Inc.* v. *United States Shipping Board Emergency Fleet Corporation*, 53 F. (2d) 359, wherein the

state practice was followed by the District Court pursuant to the Conformity Act. In neither of these cases does it appear that a motion for a dismissal without prejudice was made *in terms*. In the first cited case, the very contrary is indicated.

Apart from this, however, even if petitioner had *expressly* moved to dismiss without prejudice, the record demonstrates that the trial judge would have denied the motion, for in passing upon the motion as made, he said: *"There was sufficient to go to the jury.* I will deny your motion now and give you an exception" (R., p. 260, fol. 320).

The decided cases discredit respondent's contention (Brief, p. 10) that when a motion is made to dismiss the complaint at the end of the plaintiff's case, "it should *then* be granted or denied." For, "it is not at all unusual in this [Southern] district to reserve decision, on consent of the parties, on motions to dismiss until after the verdict of the jury." *Italian Star Line Inc.* v. *United States Shipping Board Emergency Fleet Corporation*, 41 F. (2d) 382, 384.

Respondent's statement (Brief, p. 10) that if, after moving to dismiss at the close of the plaintiff's case, "defendant goes ahead with its case, it waives its motion" is not accurate. This is true only if the motion is *denied when made* or the defendant *fails to renew* the motion at the close of the entire case. *Union Pacific Railway Co.* v. *Daniels*, 152 U. S. 684; *Columbia & Puget Sound R. R. Co.* v. *Hawthorne*, 144 U. S. 202, 206; *Hopkins* v. *Clark*, 158 N. Y. 299, 304; *Sigua Iron Co.* v. *Brown*, 171 N. Y. 488, 505-506.

In the case at bar, decision of the motion to dismiss at the close of the plaintiff's case was *reserved* without objection (R., p. 145, fol. 178). The motion was *renewed* at the close of the entire case and decision again *reserved*,

without objection, until after verdict (R., p. 242, fol. 295), when both motions were denied (R., p. 230, fols. 319-320).

With the record in this condition, it is respectfully submitted that the question as to whether or not the District Court should have dismissed the complaint on the merits or without prejudice, was properly presented to the Circuit Court of Appeals.

SECOND POINT.

This Court has power, on this record, to direct a dismissal on the merits.

As shown above, the condition of the record was such as to permit the Circuit Court of Appeals to decide that the District Court should have dismissed the complaint upon the merits, and if it so determined, to direct such a dismissal, unless prevented from so doing by the Seventh Amendment. Respondent argues, however (Brief, p. 11), that since petitioner did not request the Circuit Court of Appeals to direct the District Court to dismiss the complaint on the merits, but simply asked that a dismissal without prejudice be directed, this Court may not direct a dismissal upon the merits even if the record indicates that this should have been done below.

If it is true that this Court on writ of certiorari to the Circuit Court of Appeals is limited to a consideration of the points made *upon the argument* before that Court, rather than the issues presented by the record, then respondent is not entitled to consideration by this Court of the objections raised in Point I of his brief, which were not presented in the Circuit Court of Appeals and which are urged for the first time on this appeal.

The best refutation of his contention, however, is to be

found under Point Three of respondent's brief (p. 12) where this statement is made:

> "By the operation of the writ of certiorari, the entire record is now before this Court with power to decide the case as it was presented to the Circuit Court of Appeals. This Court may now direct such disposition of the case as the Circuit Court of Appeals might have done."

The case of *Langnes* v. *Green*, 282 U. S. 531, cited by respondent, supports this assertion. Mr. Justice Sutherland, expressing the unanimous opinion of the Court, there says (pp. 536-537):

> "What is the scope of inquiry in this Court when the case is brought up by certiorari from the circuit court of appeals? It has been decided that upon writ of error from an intermediate appellate tribunal we are not limited to a consideration of the points raised by the plaintiff, 'but must enter the judgment, which should have been rendered by the court below on the record then before it.' *Baker* v. *Warner*, 231 U. S. 588, 593. And in *Delk* v. *St. Louis & San Francisco R. Co.*, 220 U. S. 580, 588, following *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267, it was held that on certiorari, likewise, the entire record is before this court with power to review the action of the court of appeals and direct such disposition of the case as that court might have done upon the writ of error sued out for the review of the circuit (now district) court. In *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9, 21, it was said that, 'This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require' * * *."

In *Baker v. Warner*, 231 U. S. 588, the situation is thus presented and considered by this Court (p. 593):

> "The plaintiff, Baker, had a judgment in the trial court. The defendant, Warner, took the case to the Court of Appeals on various grounds, most of which were sustained. The plaintiff then brought the case here, assigning error on some of those rulings but not on others. *We are not limited, however, to a consideration of the points presented by plaintiff, but, this being a writ of error from an intermediate appellate tribunal, must enter the judgment, which should have been rendered by the Court below on the record then before it.*" (Italics ours.)

It is to be noted that in the cases cited, this Court considered objections to the decree below urged by *respondent* even though respondent had filed no cross petition for certiorari. It would seem *a fortiori* that where, as here, a petition for certiorari has been filed and granted, this Court need not limit itself to a consideration of the specific points raised by the petitioner but may "enter the judgment which should have been rendered by the court below on the record then before it."

Should this Court discover error in the decisions below, it need not remand the case to the Circuit Court of Appeals for further proceedings, but may itself make a final disposition of the cause, following the procedure adopted in *Delk v. St. Louis and San Francisco R. R.*, 220 U. S. 580, wherein it is said (pp. 588-589):

> "As the case is here upon certiorari to review the judgment of the Circuit Court of Appeals, this Court has the entire record before it with the power to review the action of that Court as well as direct such disposition of the case as that Court might have done when hearing the writ of error sued out for the review of the action of the Circuit Court."

The rule was again applied in *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9, 21, in which it was held that: "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, *but to make such disposition of the case as justice may at this time require.*" (Italics ours.)

From the foregoing it follows that this Court has power on this record to direct a dismissal either on the merits or without prejudice.

THIRD POINT.

Respondent is not entitled to review by this Court of the decree of the Circuit Court of Appeals and the judgment of the District Court.

When the petition for a writ of certiorari was filed in this Court by petitioner, respondent concurrently filed a cross-petition to review the decree of the Circuit Court of Appeals for the Second Circuit reversing the judgment of the District Court for the Southern District of New York entered upon the verdict rendered in that Court in favor of respondent. In his cross-petition and supporting brief, respondent discussed at length the sufficiency of the evidence presented upon the trial in the District Court, and sought to obtain further review thereof by this Court.

On October 8th, 1934 this Court simultaneously granted certiorari to the petitioner and denied the same to the respondent. Despite the Court's denial of his cross-petition and refusal to review the evidence presented below, respondent now seeks to obtain indirectly that very result upon the hearing of this appeal. It is too clear for citation that the denial of a writ of certiorari, while it is not to be construed as agreement by this Court with the conclusions reached in lower tribunals, is nevertheless indication that this Court does not desire to review the subject matter presented.

While undoubtedly the Court may, if it so wishes, reconsider its denial of respondent's petition and, on this appeal, take cognizance of the matters presented therein, no moving reasons are advanced in respondent's brief for the exercise of such discretion.

The cases of *Langnes* v. *Green*, 282 U. S. 531, *Alexander* v. *Cosden Co.*, 290 U. S. 484, and *Story Parchment Co.* v. *Patterson Co.*, 282 U. S. 555, cited by respondent (Brief, p. 12) are not apposite. Although it is true that in these cases this Court, on certiorari, considered respondent's contentions of error, in none of them had this Court previously denied the respondent's petition for certiorari.

Respectfully submitted,

GEO. WHITEFIELD BETTS, JR.,
Counsel for Petitioner,
120 Broadway,
New York City.

WILLIAM R. MEAGHER,
Of Counsel.

INDEX.

PAGE

FIRST POINT—The Circuit Court of Appeals properly interpreted and applied the decision of this Court in *The Slocum* case in holding that a new trial must be granted whenever a verdict is reversed by a Federal Appellate Court on account of an error of law 1

SECOND POINT—The decision of the Circuit Court of Appeals is in conformity with the interpretation placed upon the *Slocum* case by subsequent decisions of this and lower federal courts..... 6

CONCLUSION 7

TABLE OF CASES CITED:

Gasoline Products Co. v. *Champlin Refining Co.*, 283 U. S. 494 2

Pedersen v. *Delaware, Lackawanna & Western RR. Co.*, 229 U. S. 146 ..... 2, 6

Slocum v. *New York Life Insurance Company*, 228 U. S. 364 ..... 1, 4, 6

AUTHORITY CITED:

Seventh Amendment of the United States Constitution 1

Supreme Court of the United States

OCTOBER TERM, 1934—No.

BALTIMORE & CAROLINA LINE, INC.,
(Defendant-Appellant below),
Petitioner,

—against—

DONALD REDMAN,
(Plaintiff-Respondent below),
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FIRST POINT.

The Circuit Court of Appeals properly interpreted and applied the decision of this Court in *The Slocum* case in holding that a new trial must be granted whenever a verdict is reversed by a Federal Appellate Court on account of an error of law.

In *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, it was held that where a Federal Appellate Court sets aside a verdict for insufficiency in the evidence, it is bound to grant a new trial, pursuant to the provisions of the Seventh Amendment of the Federal Constitution, which are controlling in the Federal Courts, even when in conflict with state statute or practice. It was further held that under the rules of the common law, when the Court sets aside a verdict there arises the same

right of trial by jury as in the first instance and that in such trial by jury, the right to which is secured by the Seventh Amendment, both the Court and jury are essential factors. It was further held that the rules of the common law in respect to demurrers to evidence and non-suits furnish no warrant for a Federal Court setting aside a verdict and rendering judgment on the evidence without a new trial. It was further held that the right to a new trial on the vacation of a favorable verdict in a common law action is a matter of substance and not of form.

These rules were followed by this Court in *Pedersen* v. *Delaware, Lackawanna & Western RR. Co.*, 229 U. S. 146. In *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494, referred to in petitioner's brief, the ruling was not in any respect altered.

In the case at bar, the facts are analogous with those in the *Slocum* case—that is, in both cases the Appellate Court reversed a judgment for the plaintiff on the ground that a verdict should have been directed for the defendant. In the case at bar, the Circuit Court of Appeals, profiting by the decision of this Court in the *Slocum* case, rightly held that under such circumstances, the plaintiff was entitled to a new trial. Quoting from the opinion in the *Slocum* case on pages 8 and 9 of its brief, counsel for petitioner points out the distinction there made between a non-suit and a directed verdict, stressing the point that the former leaves the merits undetermined while the latter necessarily involves an adjudication of the same. The petitioner's brief apparently concedes that where an Appellate Court reverses a judgment for the plaintiff on the ground that a verdict should have been directed for the defendant, a new trial must be granted, since the direction of a verdict involves an adjudication of the merits through the accustomed co-

operation of the Court and the jury, which can only be had upon such new trial.

However, it would seem to be petitioner's whole contention on this application that as there was never any question of fact for submission to a jury, plaintiff should have been non-suited and that therefore the Appellate Court ought to have directed the District Court to enter judgment dismissing the complaint without prejudice (see Petition, pp. 1, 2, 3, 5; see Petitioner's Brief, pp. 8, 11). At page 8 of its brief, the petitioner states:

> "Here, the Circuit Court of Appeals was not asked to decide *finally any issue of fact,* but was called upon to declare that *no triable issue of fact was presented by the evidence* and to dismiss the complaint *without prejudice.*"

But the petitioner has wholly overlooked the fact that the Circuit Court of Appeals did not actually hold that the complaint should have been dismissed, but merely that the evidence was so overwhelmingly in favor of the defendant that a verdict should have been directed in its favor. For the purpose of deciding this application it would appear to be immaterial as to whether or not the Circuit Court of Appeals had power to direct the dismissal of the complaint without prejudice after reversing the verdict. The fact remains that the Circuit Court of Appeals did not actually hold that the plaintiff should have been non-suited, but merely that a verdict should have been directed in favor of the defendant, and yet this Court is now asked to tell the Circuit Court of Appeals to change its decision to one holding that the complaint should have been dismissed and to instruct said Circuit Court to order the District Court to dismiss the complaint without a new trial—all without any review of the evidence or any argument as to why the Circuit Court of Appeals erred in holding that a verdict

should have been directed for the defendant and in failing to hold that the complaint should have been dismissed.

But even assuming that the Circuit Court of Appeals had decided that the complaint should have been dismissed and had reversed on that ground, it would still have been compelled to grant a new trial. *Slocum* v. *New York Life Insurance Co. supra.* There it was pointed out by the Court (pp. 381, 382) that at common law a motion "in arrest of judgment" must always be grounded "on something apparent on the face of the pleadings", and that the rules of the Common Law in respect to demurrers to evidence and non-suits furnish no warrant for a Federal Court setting aside a verdict and rendering judgment on the evidence without a new trial (pp. 388-395). The Court further drew the distinction between a motion in arrest of judgment and a motion for judgment *non obstante veredicto,* pointing out that the first-named motion could only be made by the defendant and the last-named could only be made by the plaintiff, and that both motions must necessarily be based upon defects appearing upon the face of the pleadings. And the Court said at page 382:

> "Thus, it will be perceived that the rules of the common law, permitting a judgment *non obstante veredicto* and the arrest of judgment on a verdict, did not embrace cases like the present, but only those in which the pleadings presented no material issue requiring a trial or verdict" (p. 382).

The Court further held that the action of the Appellate Court in setting aside a verdict must be tested by the rules of the common law which required the granting of a new trial (pp. 379, 380). The Court said:

> "These decisions make it plain, first, that the action of the Circuit Court of Appeals in setting aside the verdict and assuming to pass upon the

issues of fact and to direct a judgment accordingly must be tested by the rules of the common law; * * *" (pp. 379, 380).

And again at page 380, the Court said:

> "While it is true, as before said, that the evidence produced at the trial was not sufficient to sustain a verdict for the plaintiff and that the Circuit Court erred in refusing so to instruct the jury, this does not militate against the conclusion just stated. According to the rules of the common law, such an error, like other errors of law affecting a verdict, could be corrected on writ of error only by ordering a new trial. In no other way could an objectionable verdict be avoided and full effect given to the right of trial by jury as then known and practiced. * * *"

The Court went on to say that the true test as to whether or not there was a right of trial by jury was to be determined by an inspection of the pleadings and not by an examination of the evidence (p. 398). The Court said:

> *"Whether in a given case there is a right to a trial by jury is to be determined by an inspection of the pleadings and not by an examination of the evidence. If the pleadings present material issues of fact, either party is entitled to have them tried to the court and a jury, and this is as true of a second trial as of the first.* Whether the evidence is sufficient to sustain a verdict for one party or the other is quite another matter and does not affect the mode of trial, but only the duty of the court in instructing the jury and of the latter in giving their verdict. The issues to which the jury must respond are those presented by the pleadings, and this whether the evidence be disputed or undisputed and whether it be ample or meagre. *To speak, therefore, of the evidence as determinative of the right to a*

trial by jury is to confuse the test of that right with a different test applicable only in determining whether a particular verdict should be directed.

In the present case certain well-defined issues of fact were presented by the pleadings, which the plaintiff, as also the defendant, was entitled by the Constitution to have tried to the court and a jury. Such a trial was had and resulted in a general verdict resolving all the issues in the plaintiff's favor. That verdict operated, under the Constitution, to prevent a re-examination of the issues save on a new trial granted by the trial court in the exercise of its discretion or ordered by the appellate court for error of law. * * *" (Italics ours.)

SECOND POINT.

The decision of the Circuit Court of Appeals is in conformity with the interpretation placed upon the *Slocum* case by subsequent decisions of this and lower federal courts.

As already stated, the facts in the case at bar are exactly analogous with those in the *Slocum* case—that is, in both cases the Court reversed on the ground that the lower court should have directed a verdict for the defendant. In the *Slocum* case, the Court held that a new trial should have been granted, and in the case at bar the Court granted such new trial. This rule was directly followed by the Supreme Court in *Pederson* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146. None of the other decisions alluded to in petitioner's brief dealt with the same state of facts, and the rule laid down in the *Slocum* case remains unaltered. The petitioner impliedly concedes this when it asks this Court to overrule the *Slocum* and *Pederson* cases and adopt the views contained in the dissenting opinions

in those cases (see Petitioner's Brief, pp. 14-18). It is submitted that no cogent reason has been advanced for overruling the decisions of this Court which have been in effect for over twenty years.

LAST POINT.

The prayer of the petitioner should be denied.

Respondent respectfully submits that the questions of law involved on this application have already repeatedly been decided by this Court and the lower federal courts with unanimous results under analogous states of fact, that no new question is here involved, and that there is no good reason why this Court should overrule settled law of twenty years' duration.

Respectfully submitted,

FREDERICK R. GRAVES,
Counsel for Respondent.

New York City, August, 1934.

INDEX.

	PAGE
Statement	1
The Evidence on the Trial	1
The Accident	1
The Progression of the Injury	2
Gangrene. No Doubt as to Diagnosis	3
Proximate Cause	3
Plaintiff's Failure to Make Self-Serving Declarations (Asserted in Opinion Below to Constitute Contradictory Conduct)	4
(a) To Doctors in Hospital	4
(b) Failure to Speak of Nail to Boat Medical Examiner	5
(c) Denial by Steward That Plaintiff Told Him of Nail	6
(d) The Affidavit Taken by Suessmuth	6
Conflicting Medical Opinion as to Visibility of Puncture Nine Days After Accident (Stated in Opinion Below to Constitute an Uncontradicted Physical Fact)	7
Summary of Argument	9
POINT I—The Circuit Court of Appeals properly refused to direct a dismissal "without prejudice"	9
POINT II—The defendant cannot now complain of the direction for a new trial and is not, in this court, and on this record, entitled to a direction of dismissal on the merits	10
POINT III—The Circuit Court of Appeals erroneously reversed. This court should now affirm the judgment of the District Court	12
(a) Failure to make self-serving declarations was of no probative value	14

PAGE

(b) Opinion Evidence as to Visibility of Puncture Was of No Probative Value..... 15

POINT IV—The judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court should be affirmed..... 16

TABLE OF CASES CITED:

Alexander v. *Cosden Co.*, 290 U. S. 484 at page 487.... 12

Fairmount Glass Works v. *Coal Co.*, 287 U. S. 474, at page 481 and cases cited..... 11

Greenpoint Nat. Bank v. *Gilbert*, 237 N. Y. 19 at page 23 11

Hull v. *Littauer*, 162 N. Y. 569, 572.....12, 13

Langnes v. *Green*, 282 U. S. 531, 536, 537, 538..... 12

Lord Electric v. *Edison P. C. Co.*, 234 N. Y. 411, 416.. 14

Penna. R. Co. v. *Chamberlain*, 288 U. S. 333..... 13

People v. *Collins*, 234 N. Y. 355, 365..... 14

People v. *De Paulo*, 235 N. Y. 39, 41, 42..... 14

Story Parchment Co. v. *Paterson Co.*, 282 U. S. 555.. 12

Walter v. *Laidlaw*, 249 N. Y. 46, 51..... 14

OTHER AUTHORITIES CITED:

New York Civil Practice Act, Section 482..... 9

New York Civil Practice Act, Section 459..... 11

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 178.

BALTIMORE & CAROLINA LINE, INC.,

Petitioner,

—against—

DONALD REDMAN,

Respondent.

BRIEF FOR RESPONDENT.

This Court, on petition of defendant, has granted a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit, which on defendant's appeal, reversed a judgment for plaintiff entered on a jury's verdict in a negligence action.

Defendant in the trial court had moved for a new trial and had assigned error in its denial. The Circuit Court of Appeals in reversing granted defendant a new trial. It seeks a review of that portion of the decision.

Plaintiff-respondent who also petitioned this court for certiorari, with the entire record before the court, asserts error in the reversal and asks that the judgment of the trial court be affirmed.

Statement.

The Evidence on the Trial.

The Accident.

The plaintiff, a Barbadoes negro cook aboard the "Frances Weems", arrived in Brooklyn, with the vessel, on 12 February 1930. The vessel was loading for San Domingo

and left without the plaintiff, on 15 February 1930 (R., p. 62, fol. 78; p. 238, fols. 289, 295).

At five o'clock in the morning of 13 February, the plaintiff, who lived aft on the boat, came up on deck dressed to go forward and begin his work. There were no lights on the deck, no light on the well deck where the ladder was. He walked to the end of the ladder, tripped over some broken boxes, felt a sharp pain in his foot. A nail at the end of a slat had run into his foot just above his low shoe. He went to the kitchen, took off his shoe and sock. It bled. He took a clean rag and warm water, washed it and continued with his work. "I thought nothing more." Blood was coming from where the sock joined the shoe (R., p. 63, fol. 80; p. 65, fols. 82-87). It did not bleed very much. It was a "slant puncture" of the skin. It could not be a quarter of an inch deep (R., p. 68, fol. 86; p. 86, fol. 107).

After six o'clock that morning he went back and saw the crushed boxes with nails in them (R., p. 69, fol. 86). There is corroboration that the broken boxes and debris were there and allowed to remain there until the vessel got to sea, and that the duty to clean up had not been performed (Burrows, R., p. 36, fol. 50; pp. 43-46, 47-49, 58-61; Ramsey, R., p. 197, fol. 242).

The Progression of the Injury.

On the day of the accident, 13 February, the plaintiff felt nothing wrong or sore with his foot (R., p. 69, fol. 87).

On the morning of 14 February he noticed his foot was swollen and discolored where the nail went in, but no sharp pain came from it. That night he went ashore with the steward, Ramsey. His foot hurt him during the night. There was sharp pain. He could not sleep (R., p. 71, fols. 89, 90, 91).

On the morning of 15 February his foot was so swollen he could hardly get his shoe on. He felt so bad he did not know what to do. The pain made him lame. He took

a taxi to the boat but she had sailed half an hour before (R., p. 72, fol. 91). His clothes were on the ship. He never got them back (R., p. 116, fol. 142).

He sat in a room for 4 days and nights, not going out at all, and in another room for 2 days with his foot no better and on 21 February asked his landlord to get a policeman. He had a high fever. His foot was swollen and had sharp pains in it (R., pp. 72, 73, fols. 91, 92, p. 97, fols. 119, 123).

The hospital record shows he came to the hospital in an ambulance (R., p. 148, fol. 182).

Gangrene. No Doubt as to Diagnosis.

As soon as plaintiff arrived at the hospital in the ambulance, Dr. Perez notified the chief nurse that it was a case of gangrene (R., p. 148, fol. 182). It started at the toes of the foot, and extended to about the middle of the arch (R., p. 217, fol. 264). There was an unsuccessful preliminary operation and on 17 April 1930 his leg was amputated (R., p. 14, fol. 23).

Proximate Cause.

Dr. Charache, one of the doctors who treated plaintiff in the hospital, testified for the defendant. He stated on cross examination that a traumatic injury may be a competent producing cause of dry gangrene, providing arteries are diseased (R., pp. 222-224, fols. 271, 273). (Plaintiff had, so the hospital investigation showed, diseased arteries, and the hospital doctors diagnosed his gangrene as the dry variety.) Dr. Charache testified the plaintiff had an obstruction in the flow of the blood and that if the leg is struck, or is too hot or too cold, with diseased arteries there may be gangrene in that part (R., pp. 222-224, fols. 271, 273). "Nail plus heat" could here be the cause of the gangrene (R., p. 228, fol. 278).

Dr. Newstadter, for plaintiff, to the same effect, and that the accident was the competent producing cause of the amputation (R., pp. 119-121, fols. 145, 148, pp. 125-127, fols. 153-155).

Dr. Takama, the hospital consultant in the plaintiff's case, was not called by either side, but entered on the record "Gangrene of the foot; may not be leutic cause." That is, may not be a syphilitic cause (R., p. 27, fol. 38).

Dr. Wikle testified that the slightest scratch, sufficient to draw blood can be a competent producing cause of gangrene where the arteries are diseased and that the stoppage of the blood in the arteries might have been caused by the prick of a nail (R., p. 22, fol. 33, p. 35, fol. 48). Infection as a result of the nail would be a competent producing cause (R., pp. 31, 32, fol. 44).

Dr. Perez, to practically the same effect (R., p. 161, fol. 198).

Plaintiff's Failure to Make Self-Serving Declarations (Asserted in Opinion Below to Constitute Contradictory Conduct).

(a) To Doctors in Hospital.

The Spanish doctor, Perez, who took his statement when he was admitted to the hospital, purported to testify to what plaintiff *had not told him,* three years before the trial. He testified that he first asked him questions "in relation to accident, how it happened and all thus far". He wanted to refresh his recollection by his statement. He then volunteered the information:

> "Then he claimed while he was working on some steamship line he felt a few sharp pains in the foot and never mentioned to me any accident."

Judge Bondy warned him, "You are a doctor, a man of intelligence; don't tell us what he did not mention; tell us

what he did mention" (R., p. 145, fol. 179, p. 147, fol. 180, p. 148, fol. 182).

Dr. Perez *condensed* his story and claimed that he had had to repeat all questions two or three times (R., p. 151, fol. 186). His condensation is not in evidence and we do not know what matters he regarded important and the character of answers he obtained.

Plaintiff was, according to Dr. Perez, suffering from sharp pains at the time (R., p. 148, fol. 182). Plaintiff testified he told the doctor what happened but that the doctor did not talk very good English, and as to half the questions plaintiff did not know what he was talking about. Plaintiff was not allowed by defendant's attorney to state on the stand what he had told Dr. Perez. It was not responsive (R., p. 90, fol. 111).

Judge Manton, in his dissenting opinion, has remarked upon the hostility of Dr. Perez, the fact that he did not make out his report the day he made his examination, his inability to understand English and the probability of his misunderstanding the plaintiff (R., p. 280).

Dr. Wikle did not talk to plaintiff about his foot (R., p. 90, fol. 112), and as the prevailing opinion below states, neither Dr. Charache nor Dr. Shatara could say that they had ever asked plaintiff about the history of his case (R., p. 276, fol. 345).

(*b*) *Failure to Speak of Nail to Boat Medical Examiner.*

The medical examiner did not testify.

The plaintiff testified that the medical examination was made on 14 February. It was for the voyage and was limited to venereal disease (which plaintiff did not know he had). Those who were going on the ship had to "go past the doctor". The doctor did not see the foot. He did not tell the doctor it was paining him at the time. The doctor said, "Next, next", and had no time (R., p.

70, fol. 88; p. 92, fols. 113, 114; p. 101, fol. 124; p. 112, fol. 137).

This was the day after the accident and at that time plaintiff had little pain and was not concerned about it (R., p. 70, fol. 88).

(c) Denial by Steward That Plaintiff Told Him of Nail.

Plaintiff testified on the day following the accident he had told the steward he had run a nail in his foot but that he "didn't think anything serious", and that the steward suggested liniment (R., p. 70, fol. 88).

The colored steward testified for defendant that he was not a person to whom accidents should be reported, that he had never had an accident reported to him: "No, sir, not to take any note of it" (R., p. 205, fols. 250, 251).

He had before the trial, in writing, offered to sell his testimony to the plaintiff (Pltffs.'s Ex. 5, p. 263).

(d) The Affidavit Taken by Suessmuth.

Plaintiff, over a year after the accident, made two affidavits of statements given to an adjuster of the defendant (Deft.'s Exs. B and C, pp. 264-268).

Plaintiff testified he told him as he had told it on the stand. He took the statement; said "Sign here", and plaintiff had signed without reading it (R., p. 108, fol. 132).

The affidavits are headed "Alleged injury to Donald Redman". The adjuster testified that when plaintiff came to him he had no other information about the case (R., p. 167, fol. 205). He was later recalled to the stand at the suggestion of the foreman of the jury who brought out that he had gone to the hisptal and had gotten the clinical record (R., pp. 185, 186, fol. 228). Within a week after the affidavits were signed, the plaintiff wrote Suessmuth a letter "as you is representing the Bull Line I only want to know what is their intention toward me

because I am crippled by their ship. * * *"* (Deft.'s Ex. A, p. 264).

Conflicting Medical Opinion as to Visibility of Puncture Nine Days After Accident (Stated in Opinion Below to Constitute an Uncontradicted Physical Fact).

The opinion asked the hospital doctors as to visibility did not reflect the plaintiff's testimony. He had testified:

> "Q. Was the wound a puncture or long scratch? A. It was a puncture of the skin, slant puncture. * * *
>
> Q. Was it a quarter of an inch deep? A. No it could not be; it was the skin.
>
> Q. A long scratch? A. Yes, scratch" (R., p. 86, fol. 107).

What he is led to say was a scratch after he had, in his own phrase, called it a "slant puncture", he indicated was what the reporter states is one and one half inches (R., pp. 86, 87, fols. 107, 108). It looked similar to a scratch but it ran right in the flesh at a slant. It was not a deep wound. It was discolored and red and that is all (R., p. 104, fol. 128, p. 118, fol. 144).

After he bathed his foot in warm water the scratch seemed to form a kind of blister and the blister and skin peeled right off. It was kind of red (R., p. 87, fols. 108, 109).

When Dr. Charache saw the foot in the hospital (the time he could not place, R., p. 217, fol. 264) the gangrene had extended above the middle arch of the foot. There were blisters above it with no sharp line between the blisters and the good flesh. The doctor was of the opinion that he had a burn from the hot water he had soaked it in. The skin was bruised and "all broken" (R., pp. 217, 228, fols. 264, 268, 278). He did not recall seeing a wound or

scratch deep enough to bleed, 1½ inches long (R., pp. 218, 219, fols. 266, 267).

Dr. Shatara (who was not connected with the hospital until March 1930 [R., p. 230, fol. 280] and so had not seen the leg until at least 10 days after plaintiff's arrival at the hospital) testified that the blister burns on his foot at point of entrance of the wound would be enough to obstruct it (R., p. 235, fol. 285).

Dr. Wikle said the skin was broken there. He did not look under the skin to see whether there was a puncture. Some of the blisters had broken. He did not look for any abrasion and could express no opinion as to the visibility of an abrasion eight or nine days old (R., pp. 16, 21, fols. 25, 31, 33).

Dr. Newstadter testified that gangrene is of a bluish discoloration, that inflammation may be without pus and is characterized by redness, swelling and heat; that if the blisters had come where the scratch was you could not see the scratch (R., pp. 133-138, fols. 162, 164, 165, 168).

Summary of Argument.

I.

The Circuit Court of Appeals properly refused to direct a dismissal "without prejudice".

II.

The defendant cannot now complain of the direction for a new trial and is not, in this court, and on this record, entitled to a direction of dismissal on the merits.

III.

The Circuit Court of Appeals erroneously reversed. This Court should now affirm the judgment of the District Court.

(a) failure to make self-serving declarations was of no probative value.

(b) opinion evidence as to visibility of puncture was of no probative value.

POINT I.

The Circuit Court of Appeals properly refused to direct a dismissal "without prejudice".

The jurisdiction of the Circuit Court of Appeals was purely appellate—in correction of errors of the trial court. The trial court was never asked to dismiss "without prejudice". That question was never raised in the trial court.

The motion made to dismiss at the end of the plaintiff's case was without qualification, and under New York Civil Practice Act §482, called for a dismissal on the merits. Defendant argued two grounds (1) that there was no evidence who put the boxes there and (2) that there was no evidence that the gangrene was caused by the wound. He

was asked to state further grounds and said he had none. He said "Of course, the credibility would be for the jury" (R., pp. 142-145, fols. 174-178).

Defendant acquiesced in decision being reserved to the end of the entire case, and then renewed the motion but no additional grounds were added and no qualification made in the previous grounds urged (R., p. 260). Without pressing "admissions by conduct" too far the defendant with a duty to speak, here specifically admitted that credibility of the plaintiff was for the jury.

Had the trial court been asked to dismiss "without prejudice" at the end of plaintiff's case and had the complaint been thus dismissed, the plaintiff could have immediately sued over. There would have been needless delay and expense but at any rate plaintiff would not have been foreclosed. We respectfully submit, however, that a motion to dismiss "without prejudice" can only properly be made *in terms* and at the end of the plaintiff's case; that it should then be granted or refused; that if defendant goes ahead with its case it waives its motion.

Confusion of procedure is inevitable if this Court now holds that the Circuit Court of Appeals can, after verdict, grant a motion to dismiss "without prejudice" which was never made or suggested at the trial.

POINT II.

The defendant cannot now complain of the direction for a new trial and is not, in this court, and on this record, entitled to a direction of dismissal on the merits.

Defendant, after verdict, moved to set aside the verdict (R., p. 260, fol. 320) and assigned as error that the court "erred in denying defendant's motion to set aside the verdict and for a new trial" (R., p. 272, fol. 339).

On its brief in the Circuit Court of Appeals, if we read it aright, the defendant did not withdraw its assignment of error for a new trial. It requested the Court to direct the lower court to dismiss the complaint without prejudice, or, if in doubt as to its power, to certify the question to this court.

The question of the power of the Circuit Court of Appeals to dismiss upon the merits without granting a new trial (as distinguished from the less extreme but therein requested dismissal "without prejudice" which would allow of suing over) is, we respectfully submit, too important to be decided upon such a doubtful record. The power was not, at any rate, clearly invoked in the Circuit Court of Appeals.

The procedure in regard to special verdicts, under New York Civil Practice Act, §459, was not followed. Even had it been followed it is entirely inapplicable where there is a conflict of evidence. Where a verdict is set aside as against the weight of evidence there must be a new trial.

In *Greenpoint Nat. Bank* v. *Gilbert*, 237 N. Y. 19, the Court, of this section at page 23 said:

> "When the jury had rendered its verdict the court could have set the same aside on the ground that it was against the weight of evidence, in which case there would have been a new trial, but he could not, in view of the conflict, direct a verdict as he did."

The Circuit Court of Appeals on the weight of evidence had no power to review the action of the district court in refusing to grant a new trial.

Fairmount Glass Works v. *Coal Co.*, 287 U. S. 474 at 481 and cases cited.

POINT III.

The Circuit Court of Appeals erroneously reversed. This court should now affirm the judgment of the District Court.

By the operation of the writ of certiorari the entire record is now before this Court with power to decide the case as it was presented to the Circuit Court of Appeals. This Court may now direct such disposition of the case as the Circuit Court of Appeals might have done, including the affirmance of the judgment of the District Court.

Langnes v. *Green*, 282 U. S. 531, 536.

The respondent having seasonably petitioned this Court for certiorari, although this Court is not *bound* to do so, it may consider claimed error in the decision below.

Langnes v. *Green*, 282 U. S. 531, 536, 537, 538;
Alexander v. *Cosden Co.*, 290 U. S. 484 at 487.

See also *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, where, on certiorari this Court in reversing the Circuit Court of Appeals and in affirming the District Court considered respondent's assignments of error made on appeal from the District Court.

The case is important in presenting the question of the quantum of evidence requisite to get a jury trial. The rule of the prevailing opinion is new and, as the dissenting opinion states, is destructive of jury determination.

The generally accepted rule has been stated in *Hull* v. *Littauer*, 162 N. Y. 569, 572, that if the evidence of a party is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and is not opposed to the probabilities, nor in its nature surprising or

suspicious, there is no reason for denying to it conclusiveness.

The other situation, where the evidence of a party is not contradicted by direct evidence but by circumstantial evidence, is stated as follows (p. 572):

> "If the evidence is possible of contradiction in the circumstances; if its truthfulness, or accuracy, is open to a reasonable doubt upon the facts of the case, and the interest of the witness furnishes a proper ground for hesitating to accept his statements, it is a necessary and just rule that the jury should pass upon it."

The direct evidence upon one side may be so overwhelming that it overcomes evidence of the other side based upon mere speculative inferences. A good instance is *Penna. R. Co.* v. *Chamberlain*, 288 U. S. 333, cited in the prevailing opinion below (R., p. 278), where testimony of three eyewitnesses that there was a collision overcame speculative inferences from evidence of a person not in a position to see, and paying no attention.

In the case at bar the testimony of the plaintiff that he had run a nail in his foot from boxes allowed to litter the deck was direct. It was uncontradicted by any direct evidence. It was corroborated by testimony that the boxes were there and by the fact that the foot developed a logical sequence of symptoms starting with pain.

The defendant's theory traces back from gangrene to blisters and from blisters to hot water and there stops. Why did he apply the hot water?

Petitioner at page 28 of its brief herein in terms states that it is a "*conceded fact* that respondent bathed his foot in *hot water* on February 13, 1930". Will it concede the fact but insist that the only possible cause that has been suggested and sworn to, is incredible? How can petitioner concede that part of respondent's story without taking the inevitable consequences of the concession?

(a) *Failure to make self-serving declarations was of no probative value.*

The evidence which the Court of Appeals has held overwhelms this direct evidence is a series of speculative inferences not ordinarily considered as having any probative value whatsoever. It is the failure on the part of the plaintiff to make self-serving declarations which, had he made them, would have been inadmissible.

He was brought to the hospital in an ambulance. He was in great pain. He was a voluble and ignorant negro sailor questioned by an arbitrary, impatient and undoubtedly hurried Spanish doctor. The doctor saw at a glance that it was gangrene. Did the *cause* of the gangrene have medical significance to such a doctor on such an examination? When he discovered that plaintiff had syphilis, is there any indication that he asked him how he got it? Can it be inferred that plaintiff had such a knowledge of things medically significant that he would insist on telling his own story in his own voluble way instead of attempting to answer merely the questions which were asked him and which he only half understood?

The leg was not yet off. At that time, as both a matter of fact and of psychology, the nail had no legal significance. Silence under such circumstances is too uncertain and variable to constitute contradictory conduct. There is not shown any duty to speak. Nor was there shown any opportunity to speak. The silence was of doubtful probative value.

Walter v. *Laidlaw*, 249 N. Y. 46, 51;
People v. *Collins*, 234 N. Y. 355, 365;
Lord Electric v. *Edison P. C. Co.*, 234 N. Y. 411, 416;
People v. *De Paulo*, 235 N. Y. 39, 41, 42.

A great deal in regard to these matters depends on the personality of Dr. Perez and of Redman. Trial court and jury are in a better position to judge, than an appellate court. But even on the printed page the testimony of Dr. Perez gives some indication of what must have been the manner of the questioning. The examination could not have given much leeway to the patient.

So many speculative and contradictory inferences may be drawn from the fact (if fact it be) that Redman did not mention the scratch to Dr. Perez that that silence should be held to have no evidentiary value. To give it evidentiary value would lead to absurdity. Redman might tell 99 people about the nail and one person he might not tell. The court would not receive his 99 statements. They would be self serving. But would he be a liar if a man could be produced to whom he had *not* told of the nail?

(b) *Opinion Evidence As to Visibility of Puncture Was of No Probative Value.*

The second class of evidence which the Court below held so overcame plaintiff's direct testimony that the verdict should be set aside was, what is called a physical fact, that the scratch was not visible when he reached the hospital. This we respectfully submit was in reality merely opinion testimony where the hypothesis was not correctly submitted.

It was established that the prick of a nail could cause an obstruction in diseased arteries with resultant gangrene. Dr. Wikle did not look for an abrasion and could not express an opinion as to the visibility of an abrasion 8 or 9 days old. Dr. Shatara was of opinion that the blisters would be enough to obstruct it. These doctors were in the difficult task of recollecting and describing a confused grouping of healthy brown, inflamed red, and bluish gangreneous skin in an area of approximately 9 square inches

three years after an operation, as a basis of inference as to whether there had been a "slant puncture" in the skin which bled a little, in a period anywhere from 8 or 9 days to 3 weeks before their period of observance. Not one of them looked for the puncture that plaintiff swears was, or rather, had been, there. No one of the doctors had a recollection which precluded its former presence. That they would have seen it had it been the different thing defendant placed in its hypothesis was faulty opinion evidence which did not so supplement their vague argumentative and negative recollection as to constitute physical fact evidence.

The dissenting opinion of Judge Manton below (R., pp. 279-281) tersely reviews the conflict of evidence and shows that a typical jury issue was presented; that there is no justification in any previously formulated rule or reported case in destroying the jury's determination where direct evidence of a plaintiff finds nothing against it save speculative inferences.

Hemming v. Corley 281 U.S. 90

POINT IV.

The judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court should be affirmed.

Respectfully submitted,

FREDERICK R. GRAVES,
Counsel for Respondent,
44 Whitehall Street,
New York City.

MARTIN A. SCHENCK,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 178.—October Term, 1934.

Baltimore & Carolina Line, Inc., Petitioner, *vs.* Donald Redman.	Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 3, 1935.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This was an action in a federal court in New York to recover damages for personal injuries allegedly sustained by the plaintiff through the defendant's negligence. The issues were tried before the court and a jury. At the conclusion of the evidence the defendant moved for a dismissal of the complaint because the evidence was insufficient to support a verdict for the plaintiff, and also moved for a directed verdict in its favor on the same ground. The court reserved its decision on both motions, submitted the case to the jury subject to its opinion on the questions reserved, and received from the jury a verdict for the plaintiff. No objection was made to the reservation or this mode of proceeding. Thereafter the court held the evidence sufficient and the motions ill-grounded, and accordingly entered a judgment for the plaintiff on the verdict.

The defendant appealed to the Circuit Court of Appeals, which held the evidence insufficient and reversed the judgment with a direction for a new trial.[1] The defendant urged that the direction be for a dismissal of the complaint. But the court of appeals ruled that under our decision in *Slocum* v. *New York Life Insurance Company*[2] the direction must be for a new trial. We granted a petition by the defendant for certiorari because of the last ruling and at the same time denied a petition by the plaintiff challenging the ruling on the insufficiency of the evidence.[3]

The Seventh Amendment to the Constitution prescribes:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,

[1] 70 Fed. (2d) 635.
[2] 228 U. S. 364.
[3] 293 U. S. x, XVIII.

and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted. The Amendment not only preserves that right but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of reexamination existing under the common law, and to that end declares that "no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law."

The aim of the Amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.[4]

In *Slocum* v. *New York Life Insurance Company* a jury trial in a federal court resulted in a general verdict for the plaintiff over the defendant's request that a verdict for it be directed. Judgment was entered on the verdict for the plaintiff and the defendant obtained a review in the court of appeals. That court examined the evidence, concluded that it was insufficient to support the verdict, and on that basis reversed the judgment given to the plaintiff on the verdict, and directed that judgment be entered for the defendant. A writ of certiorari then brought the case here. The question presented to us was whether, in the situation disclosed, the direction for a judgment for the defendant was an infraction of the Seventh Amendment. We held it was and that the direction should be for a new trial.

It therefore is important to have in mind the situation to which our ruling applied. In that case the defendant's request for a directed verdict was denied without any reservation of the question of the sufficiency of the evidence or of any other matter; and the verdict for the plaintiff was taken unconditionally, and not subject

[4] Walker v. New Mexico, &c. R. R. Co., 165 U. S. 593, 596; Gasoline Products Co. v. Champlin Co., 283 U. S. 494, 497-499; Dimick v. Schiedt, 293 U. S. 474, 476, 485-486.

to the court's opinion on the sufficiency of the evidence. A statute of the State wherein the case was tried made provision for reserving questions of law arising on a request for a directed verdict, but no reservation was made. The same statute also provided that where a request for a directed verdict was denied the party making the request could have the evidence made part of the record and that, where this was done, the trial court, as also the appellate court, should be under a duty "to enter such judgment as shall be warranted by the evidence". It was in conformity with this part of the statute that the court of appeals directed a judgment for the defendant.

We recognized that the state statute was applicable to trials in the federal courts in so far as its application would not effect an infraction of the Seventh Amendment, but held that there had been an infraction in that case in that under the pertinent rules of the common law the court of appeals could set aside the verdict for error of law, such as the trial court's ruling respecting the sufficiency of the evidence, and direct a new trial, but could not itself determine the issues of fact and direct a judgment for the defendant, for this would cut off the plaintiff's unwaived right to have the issues of fact determined by a jury.

A very different situation is disclosed in the present case. The trial court expressly reserved its ruling on the defendant's motions to dismiss and for a directed verdict, both of which were based on the asserted insufficiency of the evidence to support a verdict for the plaintiff. Whether the evidence was sufficient or otherwise was a question of law to be resolved by the court. The verdict for the plaintiff was taken pending the court's rulings on the motions and subject to those rulings. No objection was made to the reservation or this mode of proceeding, and they must be regarded as having the tacit consent of the parties. After the verdict was given the court considered the motions pursuant to the reservation, held the evidence sufficient, and denied the motions.

The court of appeals held that the evidence was insufficient to support the verdict for the plaintiff; that the defendant's motion for a directed verdict was accordingly well taken; and therefore that the judgment for the plaintiff should be reversed. Thus far we think its decision was right. The remaining question relates to the direction which properly should be included in the judgment of reversal.

At common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non-suiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict to the other, or making other essential adjustments.[5]

Fragmentary references to the origin and basis of the practice indicate that it came to be supported on the theory that it gave better opportunity for considered rulings, made new trials less frequent, and commanded such general approval that parties litigant assented to its application as a matter of course. But whatever may have been its origin or theoretical basis, it undoubtedly was well established when the Seventh Amendment was adopted, and therefore must be regarded as a part of the common-law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that Amendment.

This Court has distinctly recognized that a federal court may take a verdict subject to the opinion of the court on a question of

---

[5] In Carleton v. Griffin, (1758) 1 Burrow's Rep. 549, a verdict for plaintiff was taken subject to the court's opinion on questions of law, which later on were ruled in favor of defendant, whereupon a judgment for him was directed. Other early cases similarly recognized and applied the practice. Coppendale v. Bridgen, (1759) 2 Burrow's Rep. 814; Bird v. Randall, (1762) 3 Burrow's Rep. 1345; Price v. Neal, (1762) 3 Burrow's Rep. 1354; Basset v. Thomas, (1763) 3 Burrow's Rep. 1441; Timmins v. Rowlinson, (1765) 3 Burrow's Rep. 1603.

Law writers also have recognized it. 2 Tidd's Practice, (4th Am. Ed.) 900; Tidd's Practice, (London, 1837 Ed.) 538, 539; Starkie on Evidence, (10th Am. Ed.) *309; 1 Archbold's King's Bench Practice, 188, 192; Thayer's Treatise on Evidence, 241.

Later English decisions not only show the practice but also illustrate various applications of it. In Treacher v. Hinton, (1821) 4 Barn. & Ald. 413, plaintiff was non-suited with liberty to move to enter verdict in his favor, and on his motion such a verdict was ordered entered as if given by the jury. In Jewell v. Parr, (1853) 13 C. B. 909, a verdict was directed for defendant with leave to plaintiff to move to enter verdict for him if the court should be of opinion there was not sufficient evidence to sustain the verdict for defendant; and on such a motion the court held the evidence insufficient and directed entry of verdict for plaintiff. In Ryder v. Wombwell, (1868) L. R. 4 Exch. Cas. 32, a verdict was taken for plaintiff with leave to defendant to move to enter non-suit if the court should be of opinion there was lack of evidence; and on such a motion the evidence was held insufficient and non-suit entered.

law,[6] and in one case where a verdict for the plaintiff was thus taken has reversed the judgment given on the verdict and directed a judgment for the defendant.[7]

Some of the States have statutes embodying the chief features of the common-law practice which we have described. The State of New York, in which the trial was had, has such a statute; and the trial court, in reserving its decision on the motions which presented the question of the sufficiency of the evidence, and in taking the verdict of the jury subject to its opinion on that question, conformed to that statute and the practice under it as approved by the Court of Appeals of the State.[8]

In view of the common-law practice and the related state statute, we reach the conclusion that the judgment of reversal for the error in denying the motions should embody a direction for a judgment of dismissal on the merits, and not for a new trial. Such a judgment of dismissal will be the equivalent of a judgment for the defendant on a verdict directed in its favor.

The court of appeals regarded the decision in *Slocum* v. *New York Life Insurance Company* as requiring that the direction be for a new trial. We already have pointed out the differences between that case and this. But it is true that some parts of the opinion in that case give color to the interpretation put on it by the court of appeals. In this they go beyond the case then under consideration and are not controlling. Not only so, but they must be regarded as qualified by what is said in this opinion.

It results that the judgment of the court of appeals should be modified by substituting a direction for a judgment of dismissal on the merits in place of the direction for a new trial, and, as so modified, should be affirmed.

Judgment modified and affirmed as modified.

---

[6] Brent v. Chapman, 5 Cranch 358; Chinoweth v. Haskell, 3 Pet. 92, 94, 96, 98; Suydam v. Williamson, 20 How. 427, 434.

[7] Chinoweth v. Haskell, *supra.*

[8] New York Civil Practice Act, §§ 459, 461; Bail v. New York, New Haven and Hartford R. R. Co., 201 N. Y. 355; Dougherty v. Salt, 227 N. Y. 200, 203.